No. 17-1201	
Title:	**Gary Thacker, et ux., Petitioners** **v.** **Tennessee Valley Authority**
Docketed:	February 27, 2018
Lower Ct:	United States Court of Appeals for the Eleventh Circuit
Case Numbers:	(16-15105)
Decision Date:	August 22, 2017
Rehearing Denied:	November 28, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Feb 26 2018	Petition for a writ of certiorari filed. (Response due March 29, 2018) **Certificate of Word Count** **Proof of Service** **Petition** **Appendix**
Mar 20 2018	Motion to extend the time to file a response from March 29, 2018 to April 30, 2018, submitted to The Clerk. **Main Document**
Mar 21 2018	Motion to extend the time to file a response is granted and the time is extended to and including April 30, 2018.
Apr 25 2018	Motion to extend the time to file a response from April 30, 2018 to May 30, 2018, submitted to The Clerk. **Main Document**
Apr 26 2018	Motion to extend the time to file a response is granted and the time is further extended to and including May 30, 2018.
May 23 2018	Motion to extend the time to file a response from May 30, 2018 to June 29, 2018, submitted to The Clerk. **Main Document**
May 24 2018	Motion to extend the time to file a response is granted and the time is further extended to and including June 29, 2018.
Jun 29 2018	Brief of respondent Tennessee Valley Authority in opposition filed. **Proof of Service** **Main Document**
Jul 13 2018	Reply of petitioner Gary Thacker, et ux filed.

	Main Document	**Proof of Service**	**Certificate of Word Count**
Jul 18 2018	DISTRIBUTED for Conference of 9/24/2018.		
Sep 27 2018	Petition GRANTED.		
Sep 28 2018	The order granting the petition for a writ of certiorari is amended as follows: The petition for a writ of certiorari is granted limited to Question 1 presented by the petition.		
Nov 13 2018	Brief of petitioners Gary Thacker, et ux filed.		
	Main Document	**Certificate of Word Count**	**Proof of Service**
Nov 19 2018	Joint appendix filed.		
	Main Document		
Nov 28 2018	SET FOR ARGUMENT ON Monday, January 14, 2019		
Nov 30 2018	CIRCULATED		
Dec 11 2018	Record requested from the U.S.C.A. 11th Circuit.		
Dec 13 2018	Brief of respondent Tennessee Valley Authority filed. (Distributed)		
	Main Document	**Proof of Service**	
Dec 18 2018	Record received from the U.S.C.A. 11th Circuit is electronic and located on PACER.		
Dec 26 2018	Record from the U.S.D.C. Northern Dist. of Alabama is electronic and located on the District courts web site.		
Jan 04 2019	Reply of petitioners Gary Thacker, et ux filed. (Distributed)		
	Main Document	**Certificate of Word Count**	**Proof of Service**
Jan 14 2019	Argued. For petitioners: Franklin Taylor Rouse, Huntsville, Ala. For respondent: Ann O'Connell Adams, Assistant to the Solicitor General, Department of Justice, Washington, D. C.		

NAME	**ADDRESS**	**PHONE**
Attorneys for Petitioners		
Franklin Taylor Rouse Counsel of Record	Conchin, Cloud & Cole, LLC 2404 Commerce Court, S.W. Huntsville, AL 35801 taylor@conchincloudcole.com	256-705-7777

Party name: Gary Thacker, et ux

Attorneys for Respondent

Noel J. Francisco Counsel of Record	Solicitor General United States Department of Justice 950 Pennsylvania Avenue, NW Washington, DC 20530-0001 SupremeCtBriefs@USDOJ.gov	202-514-2217

Party name: Tennessee Valley Authority

No. _____

In The
Supreme Court of the United States

GARY THACKER,
VENIDA L. THACKER,
Petitioners,

v.

TENNESSEE VALLEY AUTHORITY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Franklin T. Rouse
Counsel of Record
Kenneth B. Cole, Jr.
Gary V. Conchin
CONCHIN CLOUD & COLE, LLC
2404 Commerce Court
Huntsville, Alabama 35801
(256) 705-7777
taylor@conchincloudcole.com

Counsel for Petitioners ***Dated: February 26, 2018***

THE LEX GROUP[DC] ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

QUESTIONS PRESENTED

1.

This Court tests the immunity of governmental "sue and be sued" entities (like the Tennessee Valley Authority) under *Fed. Housing Amin. v. Burr*, 309 U.S. 242 (1940). The Court has declined to borrow rules from the Federal Tort Claims Act (FTCA) to narrow that immunity. *FDIC v. Meyer*, 510 U.S. 471 (1994). Did the Eleventh Circuit err by using an FTCA-derived "discretionary-function exception," rather than *Burr*, to immunize the TVA from the plaintiffs' claims?

2.

Did the Eleventh Circuit, in any case, correctly apply the discretionary-function test? Did that court correctly hold that safely raising a downed power line from the Tennessee River constitutes the sort of "policy"-laden discretionary work that this exception was designed to immunize from suit?

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OPINIONS BELOW

The opinion of the Eleventh Circuit is reported at 868 F.3d 979 (11th Cir. 2017). Pet. App. 1a–9a. The decision of the district court is reported at 188 F. Supp. 3d 1243 (N.D. Ala. 2016). Pet. App. 12a–16a.

JURISDICTION

This Court has subject-matter jurisdiction of this suit under Article III, Section 2 of the U.S. Constitution and under 28 U.S.C. § 1254(1). The Eleventh Circuit's decision was entered on August 22, 2017. Pet. App. 10a. That court denied the plaintiffs' timely petition for a panel rehearing on November 28, 2017. Pet. App. 17a. The Solicitor General of the United States has been served with a copy of this petition in accordance with Supreme Court Rule 29.4(a).

STATUTES INVOLVED

The following statutes, due to their length, are set out at Pet. App.18a–37a. Sup. Ct. R. 14(f), (i)(v).

16 U.S.C. § 831c
28 U.S.C. § 1346
28 U.S.C. § 2679
28 U.S.C. § 2680

STATEMENT OF THE CASE

This petition seeks review of an Eleventh Circuit decision. The underlying suit is a personal-injury action against the defendant Tennessee Valley

Authority (TVA). The district court thus has subject-matter jurisdiction of this suit under 28 U.S.C. § 1331. *E.g.*, *Jackson v. TVA*, 462 F. Supp. 45, 50 (M.D. Tenn. 1978) (suits against TVA come within federal-question jurisdiction) (citing *Pac. R.R. Removal Cases*, 115 U.S. 1 (1885) (claims against entities incorporated by Act of Congress fall within general federal-question jurisdiction)).

1. Facts — A Tragic Accident on the Tennessee River

The Eleventh Circuit concisely and accurately recounted the facts giving rise to the Thackers' claims:

> Gary and Venida Thacker sued the [TVA] . . . for its alleged negligence involving a tragic accident on the Tennessee River. On July 30, 2013, while Gary Thacker and his friend Anthony Szozda were participating in a local fishing tournament, TVA was attempting to raise a downed power line that was partially submerged in the river. The power line, which crossed the river, had become lax earlier in the day when a pulling cable failed during a conductor-replacement project. At the same moment that TVA began lifting the conductor out of the water, the fishing partners' boat passed through the area at a high rate of speed, and the conductor struck both Thacker and Szozda. As a result, according to the

> complaint, Thacker suffered serious physical injuries, his wife suffered loss-of-consortium damages, and Szozda was killed instantly.

Pet. App. 2a. On these facts, the Thackers claimed that the TVA had not used reasonable care in assembling and installing its power lines, in warning boaters of the hazard it had created, and in responding to the resulting emergency.[1]

2. The District Court's Decision

On the TVA's motion, the district court dismissed the Thackers' case under Rule 12(b)(1) for lack of subject-matter jurisdiction. Pet. App. 12a–16a. More precisely, the district court held that the TVA was immune from this suit under the "discretionary function" rule. *Id.* The TVA had argued that "because the complaint concerns personal injuries arising out of [its] response to an emergency created during maintenance of its electrical power lines," the district court "lack[ed] subject[-]matter jurisdiction under the discretionary[-]function doctrine." Pet. App. 12a–13a.

The district court agreed. Citing the TVA's organic statute — specifically, 16 U.S.C. § 831c(b), which authorizes the TVA to "sue and be sued in its corporate name" — the district court first allowed that "the TVA does not enjoy sovereign immunity." Pet. App. 13a. Nonetheless, it reasoned that the TVA

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[1] Compl. – Br. of Appellants App. 15–16 (¶¶ 21, 25–26). This cite is to the appendix in the Eleventh Circuit. *See* Fed. R. App. P. 28(e).

"cannot be subject to liability" where it is "engaged in a governmental function that is discretionary in nature." Pet. App. 13a–14a (quoting *Hill v. TVA*, 842 F. Supp. 1413, 1420 (N.D. Ala. 1993)). The district court then found that the TVA here was engaged in a "response to an emergency" and that such "safety decisions represent an exercise of discretion giving rise to governmental immunity." *Id.* The court granted TVA's motion and dismissed the case. Pet. App. 14a–15a.

3. The Intermediate Appeal — Borrowing the FTCA's Discretionary-Function Test

The Eleventh Circuit upheld the dismissal. It, too, held the TVA immune from the Thackers' claims. The appeals court started by discussing the immunity enjoyed, not by the TVA specifically, but by the United States:

> The United States enjoys sovereign immunity from suit unless it unequivocally waives it in statutory text. *Lane v. Pena*, 518 U.S. 187, 192 (1996) (citation omitted). When Congress waives sovereign immunity, we must strictly construe that waiver, in terms of its scope, in favor of the United States. *See id.* (citation omitted).

Pet. App. 3a. At the same time, the court recognized that, under 16 U.S.C. § 831c(b), the TVA is "expressly" authorized to "sue and be sued" in its own name. Pet. App. 4a.

The Eleventh Circuit's analysis then took a decisive turn. The court wrote: "Though 'sue-and-be-sued' waivers are liberally construed," they are "subject to certain exceptions." *Id.* (citing cases). The operative exception, in the Eleventh Circuit's view, was the "discretionary-function exception." *See id.* The court explained that it had applied this exception "in cases arising out of TVA's commercial, power-generating activities." *Id.* The court expressly borrowed this limitation from the Federal Tort Claims Act (FTCA). Pet. App. 5a–6a. The Eleventh Circuit said that the discretionary-function exception that it applies to the TVA is the "same test" that applies under the FTCA. Pet. App. 6a. The court then held that the TVA's challenged acts — which it described as the "assembly and installation of power lines" and inadequately "warning boaters . . . of the hazards the TVA [had] created" — "plainly involved public-policy considerations." Pet. App. 6a, 8a. The acts were thus discretionary. Pet. App. 6a–9a. They fell outside the TVA's sue-and-be-sued clause and could not undergird a claim against the TVA. *Id.* The appeals court thus agreed that the TVA was immune from the Thackers' suit. *Id.* It affirmed the jurisdictional dismissal. Pet. App. 9a.

The Eleventh Circuit entered its decision on August 22, 2017. Pet. App. 1a, 10a. The Thackers timely sought a panel rehearing, but, on November 28, 2017, their request was denied. Pet. App. 17a. The Thackers now bring this petition for a writ of certiorari.

ARGUMENT

The Eleventh Circuit applied the wrong legal test — and thus reached the wrong result. Using its own precedent, rather than this Court's, the Eleventh Circuit tested the TVA's sue-and-be-sued immunity under a "discretionary-function" test borrowed from the Federal Tort Claims Act (FTCA). But the FTCA does not apply to the TVA. And this Court's long-established precedent does not recognize a discretionary-function exception to limit sue-and-be-sued entities' amenability to suit. This Court has instead expressly *declined* to borrow rules from the FTCA to diminish sue-and-be-sued clauses like the one that "broad[ly]" opens the TVA to suit.

The Eleventh Circuit's analysis thus departs from this Court's rules — from both the deeper principles and the overt test, which have been in place since at least 1940 — describing the narrow immunity of federal "sue and be sued" entities. It also conflicts with the (correct) approach taken by the Second and Fourth Circuits. Both of those grounds would, of course, justify this Court's granting a writ of certiorari. *See* Sup. Ct. R. 10(a), (c).

In the end, after applying the (misplaced) discretionary-function test, the lower courts took what should have been a "broad" and "liberal[]" amenability to suit — and inverted it to yield a nearly impregnable immunity. For, if the TVA cannot be sued for the workaday accident that it caused here, then it is hard to see what it could ever be sued for. Its notionally "broad" suability will have all but vanished.

The Thackers ask the Court to confirm and thus clarify the immunity rules that govern the TVA's sue-and-be-sued liability. And, ultimately, to hold that — contrary to the lower courts' decisions — the district court does have subject-matter jurisdiction to hear their claims against the TVA.

1. The Largely Commercial TVA Is "Broadly" Amenable to Suit

The TVA's organic statute empowers it to "sue and be sued" in its own name. 16 U.S.C. § 831c(b) (Pet. App. 18a).[2] The TVA is not the United States; it is "a corporate entity, separate and distinct from the Federal Government itself." *Pierce v. United States*, 314 U.S. 306, 310 (1941). The TVA "operates in much the same way as an ordinary business corporation, under the control of its directors in Tennessee, and not under that of a cabinet officer or independent agency headquartered in Washington." *Nat'l Resources Defense Council, Inc. v. TVA*, 459 F.2d 255, 257 (2nd Cir. 1972); *accord, e.g., North Carolina ex rel. Cooper v. TVA*, 439 F. Supp. 2d 486, 490 (W.D.N.C. 2006). The TVA may be the preeminent example of a governmentally created entity that, over time, has grown into a distinct commercial corporation.[3]

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[2] "Except as otherwise specifically provided *in this chapter* [the Tennessee Valley Authority Act of 1933], the [TVA] . . . [m]ay sue and be sued in its corporate name." 16 U.S.C. § 831c(b) (Pet. App. 18a) (emphasis added). No limitation on the TVA's sue-and-be-sued clause, arising from the TVA Act, is involved in this case.

[3] When it created the TVA in 1933, Congress "intend[ed] that [the TVA] shall have much of the essential freedom and elasticity of a private business corporation." *N.C. ex rel. Cooper v. TVA*, 515 F.3d 344, 349 (4th Cir. 2008) (quoting H.R. Rep. No.

The Federal Tort Claims Act does not apply to the TVA. The FTCA expressly excludes the TVA from its purview. 28 U.S.C. § 2680(l) (Pet. App.34a, 36a).[4] Furthermore, "[b]y permitting [the TVA] to sue and be sued, Congress effected a 'broad' waiver" of any governmental immunity that the TVA might have otherwise enjoyed. *See FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (quoting *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992)). This Court has elsewhere put these same points thus:

> By launching 'the [TVA] into the commercial world,' and including a sue-and-be-sued clause in its charter, Congress has cast off the [TVA]'s 'cloak of sovereignty' and given it the 'status of a private commercial enterprise.' [*Library of Congress* v. *Shaw*, 478 U.S. 310, 317 n. 5 (1986)]. It follows that Congress is presumed to have waived any otherwise existing immunity of the [TVA] . . . .

Loeffler v. Frank, 486 U.S. 549, 556 (1988) (discussing the U.S. Postal Service).

73-130 at 19 (1933)). The TVA has since become the largest public-power company in the nation, supplying electricity to more than 9 million customers in 7 states, and generating more than $11 billion in annual revenue. TVA Annual 10-K Report 2015 (available at http://www.snl.com/IRW/FinancialDocs/4063363) (last accessed Feb. 9, 2018).

[4] The FTCA states: "The provisions of this chapter [28 U.S.C. §§ 2671–80] and section 1346(b) of this title shall not apply to . . . [a]ny claim arising from the activities of the Tennessee Valley Authority." 28 U.S.C. § 2680(l) (Pet. App. 34a, 36a).

2. This Court's Correct Suability Test: *Burr–Loeffler–Meyer*

Sue-and-be-sued entities like the TVA are immune from suit in only a few circumstances. This Court defined those circumstances in 1940's seminal *Fed. Housing Admin. v. Burr*, 309 U.S. 242 (1940). The Court there wrote — in language that should have controlled the lower courts' analyses in this case:

> [W]aivers by Congress of governmental immunity . . . should be *liberally construed*. . . . Hence, when Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to "sue and be sued," it cannot be lightly assumed that restrictions on that authority are to be implied. Rather if the general authority to "sue and be sued" is to be delimited by implied exceptions, it must be *clearly shown* [1] that certain types of suits are not consistent with the statutory or constitutional scheme, [2] that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or [3] that for other reasons it was plainly the purpose of Congress to use the "sue and be sued" clause in a narrow sense.

Burr, 309 U.S. at 245 (emphases added). "Absent such a showing, agencies 'authorized to "sue and be sued"

are presumed to have fully waived immunity.'" *Meyer*, 510 U.S. at 481 (quoting *Int'l Primate Protection League* v. *Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 86 (1991)).[5]

The Court has confirmed that sue-and-be-sued clauses "are to be 'liberally construed,' notwithstanding the general rule that waivers of sovereign immunity are to be read narrowly in favor of the sovereign." *Id.* at 480 (quoting *Burr*, 309 U.S. at 245 and citing *Nordic Village*, 503 U.S. at 34). This Court has further explained: "[W]hen Congress launche[s] a governmental agency into the commercial world and endow[s] it with authority to 'sue or be sued,' *that agency is not less amenable to judicial process than a private enterprise* under like circumstances would be." *Id.* at 481 (quoting *Burr*, 309 U.S. at 245) (emphasis in *Meyer*).[6]

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[5] *International Primate* was superseded by statute on other grounds. *See, e.g., City of Cookeville v. Upper Cumberland Elec. Mbrshp. Corp.*, 484 F.3d 380, 389–90 (6th Cir. 2007); *Neb. ex rel. Dep't of Soc. Servs. v. Bentson*, 146 F.3d 676, 678 (9th Cir. 1998).

[6] *Accord Franchise Tax Bd. of Cal. v. USPS*, 467 U.S. 512, 520 (1984) ("Under *Burr* not only must we liberally construe the sue-and-be-sued clause, but also we must presume that the [Postal] Service's liability *is the same as that of any other business*") (emphasis added); *Loeffler*, 486 U.S. at 557 (through a sue-and-be-sued clause, "Congress waived [the Postal Service's] immunity . . . , authorizing recovery of interest from the Postal Service *to the extent that interest is recoverable against a private party* . . . .") (emphasis added). These parentheticals are taken from *Meyer*, 510 U.S. at 481.

3. The Decisive Effect of *Meyer*

This Court's decision in *Meyer* is conclusive. The Eleventh Circuit's sue-and-be-sued jurisprudence has walked the very path that *Meyer* declined to tread. More exactly, the *Meyer* Court held that *Burr's* immunity test could not be modified — that sue-and-be-sued clauses could not be pared back — by FTCA-based, immunity-broadening alterations of the sort that the Eleventh Circuit applied to the TVA here. *Meyer*, 510 U.S. at 480–83. *Meyer* alone warrants reversing the decisions below.

In *Meyer*, the Federal Savings and Loan Insurance Corporation (FSLIC), a sue-and-be-sued entity,[7] served as a thrift institution's receiver. The FSLIC fired Meyer, a senior thrift officer. Meyer then sued the FSLIC, claiming that his discharge violated his due-process rights under the Fifth Amendment. *Id.* at 473–74. The FSLIC argued that sovereign immunity barred Meyer's claims. *Meyer v. Fidelity Sav.*, 944 F.2d 562, 566 (9th Cir. 1991).

This Court disagreed. The Court first held that immunity had to be tested, not under the FTCA, but under *Burr*. *Meyer*, 510 U.S. at 476–81. More fully, the Court held that, because the United States has not made itself suable under § 1346(b) of the FTCA for constitutional torts, Meyer's Fifth Amendment claim was not cognizable under the FTCA and was properly brought against the FSLIC "in its own

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[7] Congress empowered the FSLIC "to sue and be sued, complain and defend, in any court of competent jurisdiction." 12 U.S.C. § 1725(c)(4) (repealed 1989).

name." *Id.* at 477–78. The question thus became "whether the FSLIC's sue-and-be-sued clause waive[d] sovereign immunity for [that] claim." *Id.* at 479. The Court explained that that clause's "liberal[]" immunity waiver could "[]not be limited . . . unless" the FSLIC made a "clear showing" that satisfied one of *Burr's* three grounds for invoking immunity. *Id.* at 480 (citing cases). "Absent such a showing, agencies authorized to 'sue and be sued' are presumed to have fully waived immunity." *Id.* at 481 (quoting *International Primate*, 500 U.S. at 86 n. 8).

We now reach the crucial point: The *Meyer* Court rejected arguments, and approaches to sue-and-be-sued analysis, that are substantively indistinguishable from the Eleventh Circuit's precedent and its analysis in this case. The FSLIC had argued in *Meyer* that its amenability to suit should be "limited" to cases in which a private person could be sued. *Id.* at 480. "In essence," the Court explained, the FSLIC wanted to "engraft a portion of . . . § 1346(b) [of the FTCA] . . . onto [its] sue-and-be-sued clause," to diminish the clause's immunity waiver. *Id.*[8] This Court rejected that approach — in a way that speaks directly to the Eleventh Circuit's analysis here. The *Meyer* Court explained that "sue-and-be-sued clauses cannot be limited by implication" without a "clear showing" under *Burr*. *Id.* at 480. The Court thus expressly declined to *"engraft language from § 1346(b) [of the FTCA] onto the [FSLIC's] sue-*

[8] Specifically, the FSLIC sought to "engraft" onto its suability clause "a portion of the sixth element of § 1346(b) — liability 'under circumstances where the United States, if a private person, would be liable to the claimant.'" *Meyer*, 510 U.S. at 480 (quoting 28 U.S.C. § 1346(b)(1)).

and-be-sued clause." *Id.* at 480, 483 (emphasis added). The Court reasoned that the FSLIC's position, "taken to its logical conclusion . . . *would render coextensive the scope of the waivers contained in §1346(b) [of the FTCA] and sue-and-be-sued clauses generally.*" *Id.* at 483 (emphasis added). The Court refused to presume that Congress had intended that. *Id.*[9]

Because the FSLIC had made "no showing . . . to overcome [the] presumption" that the sue-and-be-sued clause "fully waived" the FSLIC's immunity, this Court held "that FSLIC's sue-and-be-sued clause [had] waive[d] the agency's sovereign immunity for Meyer's constitutional tort claim." *Id.* (quoting *Franchise Tax Board*, 467 U.S. at 520; and *International Primate*, 500 U.S. at 86 n.8).

The Eleventh Circuit has run afoul of all this. It "engrafts" an FTCA-derived limitation (the

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[9] More fully — though in a way that is just outside present concerns — *Meyer* found the FSLIC's immunity-broadening argument inconsistent with the FTCA's exclusive-remedy provision (28 U.S.C. § 2679(a)), which expressly adjusts the sue-and-be-sued characteristics of "federal agenc[ies]" when claims against them are made under the FTCA (28 U.S.C. § 1346(b)). The *Meyer* Court thus would not presume that immunity under the FTCA, and under sue-and-be-sued clauses "generally," could be made "coextensive" when Congress had declared otherwise. *Meyer*, 510 U.S. at 483. This particular aspect of *Meyer* does not apply perfectly here, and does not affect our main analysis: Claims against the TVA are not cognizable under the FTCA; and the TVA is not a "federal agency" of the type that *Meyer* and § 2679(a) have in mind. So this case does not directly implicate § 2679(a) and its relationship to sue-and-be-sued rules. Our point is simply that *Meyer* rejected borrowing from the FTCA to modify sue-and-be-sued immunity under *Burr* where there is no extrinsic warrant for doing so.

discretionary-function exception) onto the TVA's "broad" sue-and-be-sued immunity waiver. (That waiver is limited only by other provisions of the Tennessee Valley Authority Act; it is not limited by anything in FTCA law. *See* 16 U.S.C. § 831c(b) (Pet. App. 18a); *supra*, n. 2.) The Eleventh Circuit thereby reads an implicit limitation into the TVA's sue-and-be-sued clause — one that the TVA's organic statute does not expressly contain or hint at. *See id.* Furthermore, the Eleventh Circuit applies this limitation *before* the TVA has made the "clear showing" that *Burr* requires to invoke immunity. Finally, roughly as in *Meyer*, the Eleventh Circuit's imported "discretionary-function exception" — embodying the "same test" as applies under the FTCA itself — would make sue-and-be-sued immunity waivers largely "coextensive" with such waivers under the FTCA. Yet neither the TVA's suability clause, nor the FTCA, suggests that Congress intended that equivalence. *See id.*; 28 U.S.C. § 2680(l) (Pet. App. 34a, 36a) (FTCA does not govern claims against TVA). The Court rejected this whole mode of reasoning in *Meyer*; it should reject it again here.

4. Circuit Split and Further Problems in the Eleventh Circuit's Analysis

4.1 The Circuit Split

The Eleventh Circuit's sue-and-be-sued analysis — and, if the TVA is correct, the Sixth Circuit's, as well — conflicts not only with this Court's precedent, but also with the correct approach taken by other circuits. The Fourth Circuit has thus assessed the TVA's immunity for claims arising from its

commercial, power-generating activities (like the claims here) and has said: "We . . . hold that the broad waiver of sovereign immunity effected by the TVA's 'sue-and-be-sued' clause *is not restricted by a discretionary function exception* in this case." *N.C. ex rel. Cooper v. TVA*, 515 F.3d 344, 350 (4th Cir. 2008) (emphasis added).[10] The Second Circuit agrees. In *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009), *rev'd in part on other grounds*, 564 U.S. 410 (2011), that court declined to apply a discretionary-function exception to the TVA's suability. *Id.* at 389–92. It instead correctly tested the TVA's immunity under the *Burr–Loeffler–Meyer* standard and held that the TVA's power-related activities were not exempt from suit. *Id.*

This situation denies citizens in the Sixth and Eleventh Circuits the rights that citizens of the Second and Fourth Circuits enjoy. The TVA is a sprawling entity, whose commercial activity is continuously affecting Americans across the country — and affects them in much the same way. Given the TVA's expansive reach, and the fact that the rights in question are basic, garden-variety tort rights to seek remedies for harmful misconduct, it is hard to imagine why the TVA should not be equally open to civil lawsuits wherever it operates.

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[10] The Fourth Circuit in *Cooper* did "not . . . reach" the question of whether the TVA ever "retains a measure of . . . immunity" when it otherwise "engages in a governmental function." *Cooper*, 515 F.3d at 350 n.4.

4.2 Other Problems in the Eleventh Circuit's Analysis

This may be the best place to notice two additional problems in the Eleventh Circuit's analysis. The first is plain enough, and may be only a matter of reframing what we have already said. The point is simply that, by importing a discretionary-function exception from the FTCA, to constrict the TVA's sue-and-be-sued clause, the appeals court undermines the statutory scheme. The FTCA expressly puts the TVA outside its reach (28 U.S.C. § 2680(l)); while the TVA's sue-and-be-sued clause (16 U.S.C. § 831c(b)) recognizes only limits that are located inside the Tennessee Valley Authority Act. The Eleventh Circuit's reasoning ignores and abrades both statutes.

The second problem is this: Both formally and substantively, the Eleventh Circuit reversed key underlying principles. In short, that court transposed key elements of this Court's established guidance on how broadly or narrowly to shape governmental immunity. The Eleventh Circuit took as its leading rule the directive that immunity waivers are to be read narrowly. *See* Pet. App. 3a ("When Congress waives sovereign immunity, we must strictly construe that waiver . . . in favor of the United States.") It then reasoned in a limiting way about how normally "broad" sue-and-be-sued clauses — which open entities like the TVA to suit — have "exceptions." Pet. App. 4a. And, again, it then grafted the FTCA's discretionary-function exception onto the TVA's sue-and-be-sued rules. The Eleventh Circuit's first tenets thus biased its analysis toward broadening immunity and constricting sue-and-be-sued liability.

But this gets the doctrinal priority backward — in a way that matters. This Court has said that sue-and-be-sued clauses are to be "liberally construed" — to permit suits — "*notwithstanding* the general rule" that narrows immunity waivers in the sovereign's favor. *Meyer*, 510 U.S. at 480–81 (citing *Burr*) (emphasis added); *see Loeffler*, 486 U.S. at 554–55 ("[W]hen Congress establishes such an agency . . . and permits it to 'sue and be sued,' it cannot be lightly assumed that restrictions on that authority are to be implied.") (citing cases). The intermediate court's guiding principle should have been one of "liberally" expecting that the TVA was open to suit. The Eleventh Circuit rewrote, reversed, and thus largely gutted that rule.

5. The TVA Made No Showing Under *Burr–Loeffler–Meyer*

5.1 The TVA Did Not Try to Satisfy *Burr*

The TVA never even tried to show that this case meets one of *Burr's* three criteria for invoking immunity despite a sue-and-be-sued clause. Much less did the TVA make a "clear showing" that it is immune under *Burr*. For this reason alone, the jurisdictional dismissals should be reversed. *Cf. Meyer*, 510 U.S. at 481 (dismissing in one sentence defendant agency's failure to "attempt . . . the 'clear' showing . . . necessary to overcome the presumption that immunity has been waived").

5.2 The TVA's Innate-Limitation Argument — and Its Errors

The TVA instead brushed aside *Burr*, *Loeffler*, and *Meyer*, and put all its chips on the notion that its sue-and-be-sued clause simply *is* limited by a judicially created discretionary-function exception. (Br. of Appellee TVA at 22–30.)[11] It invoked precedent from the Sixth and Eleventh Circuits that had used the exception to limit its amenability to suit. (*Id.* at 23–24, 30.)

The TVA's analysis does nothing to override this Court's precedent — not only *Burr*, *Loeffler*, and *Meyer* themselves, but the statutes, cases, and principles upon which they drew. Its argument moreover is largely inscrutable. What does it mean, for instance, when, ostensibly commenting on *Burr's* three-part test, the TVA writes that,

> the scope of a Federal agency's sue-and-be-sued waiver with respect to a specific incident of suit is not a matter susceptible to textual parsing; rather, it is a matter to be resolved by legal policy analysis . . . [?]

(*Id.* at 27.) And what impact is that . . . insight . . . supposed to have on this analysis? It is far from clear.

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[11] This citation refers to the TVA's main brief, filed in the Eleventh Circuit on September 29, 2017. Pinpoint citations are to the page numbers generated by that court's electronic-docketing system. That system did not assign the parties' filings unique document numbers, so this is the fullest cite that the Thackers can provide this Court.

> Elsewhere, the TVA contends:
>
> > In [*Meyer*], the Court held that the [FSLIC]'s sue-and-be-sued clause did not bar a potential tort claim for an alleged constitutional violation . . . but nonetheless refused to recognize such a claim against Federal agencies as a matter of policy.
>
> (*Id.* at 28) (citing *Meyer*, 510 U.S. at 480–86).

As a thumbnail description of *Meyer*, with no particular implication for this case, this passage is superficially accurate — as far as it goes. That is the most charitable reading one can give of this passage. But if, as seems the case, the TVA means to draw from *Meyer* a substantive lesson for this case, then its mistake is deep. The TVA in fact proffers a gross *non sequitur*. One that *Meyer expressly pointed out*. Like the FSLIC in *Meyer*, the TVA here "conflates" two different things. *See Meyer*, 510 U.S. at 483–84. Whether the *Meyer* plaintiff had a viable claim was one thing; but this had nothing to do with whether the FSLIC's sue-and-be-sued clause made the agency *amenable* to such a claim. *See Meyer*, 510 U.S. at 480–86. More to the present point, whether the *Meyer* plaintiff posed an actionable theory says nothing about whether a discretionary-function rule limits the TVA's suability. The *Meyer* Court expressly pointed out the distinction and the error. First, again, the Court "h[e]ld that FSLIC's sue-and-be-sued clause *waives the agency's sovereign immunity* for Meyer's constitutional tort claim." *Id.* at 483 (emphasis added). The Court then turned to the "second

inquiry": "whether the . . . substantive law" recognized the posited claim. *Id.* at 484. For reasons entirely unrelated to the immunity waiver, the Court declined to recognize the novel theory that the *Meyer* plaintiff advanced. *Id.* at 483–86.[12] The breadth of the FSLIC's sue-and-be-sued clause, and the viability of the plaintiff's substantive claim, were two different things. *Meyer* itself called them "analytically distinct." *Id.* at 484. Returning to the identical error in the TVA's reasoning here, we can more precisely observe that the words "but nonetheless" in the TVA's explanation suggest a logical connection between the two parts of *Meyer* that simply does not exist. Again, the TVA presses its case on the strength of a plain *non sequitur*.

The TVA's clearest argument insists (in sum) that waivers of governmental immunity — embodied here in its sue-and-be-sued clause — are innately limited by a discretionary-function exception. (*See* Br. of Appellee TVA at 28–29.) That discretionary acts are always immune — regardless of what a sue-and-be-sued statute says. (*See id.*) The TVA, in other words, sees a discretionary-function rule inherent in the notion of sovereign immunity. The Sixth and Eleventh Circuits, in the TVA's view, have merely recognized that fact.

Problems with that position leap off the page. Before anything else, the TVA's reasoning collides

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[12] Specifically, the *Meyer* Court refused to expand constitutional-tort claims under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) so that they could be brought "directly against a federal agency." *Meyer*, 510 U.S. at 483–86.

with, and then tramples over, *Meyer's* overt refusal to "engraft" a discretionary-function limitation onto sue-and-be-sued clauses "generally." More strikingly, the TVA's position implies that, since at least 1940, this Court has failed to understand the correct bounds of sovereign immunity. That, had the Court rightly grasped the shape of that immunity, it would never have written *Burr*, *Loeffler*, and *Meyer*, but instead would have appended a discretionary-function exception to all such sue-and-be-sued clauses.

* * *

At most, the TVA's argument points to the conflict in how the appellate courts have handled sue-and-be-sued entities — and the TVA in particular. Even if the TVA's argument is minimally cogent, then, the Court should still grant this petition to resolve any misunderstanding at the intermediate-appellate level, and to again confirm that sue-and-be-sued clauses like the TVA's are tested under the rules that flow through *Burr*, *Loeffler*, and *Meyer*.

6. This Court Has Said That Acts Like These Are Not Discretionary

Even if a discretionary-function exception did apply here, though, the TVA's misconduct would not fall within it. The challenged acts would not be "discretionary" under that test, in other words, and thus would not be immunized. The second prong of the discretionary-function test under 28 U.S.C. § 2680(a) asks whether the challenged acts are "of the kind that the discretionary function exception was designed to shield." *E.g.*, *Berkovitz v. United States*,

486 U.S. 531, 536 (1988). The wrongs alleged here — in short, unsafely installing power lines, creating a hazard, failing to warn of or guard against the hazard, and failing to safely fix the hazard — are not the sort of "policy"-laden, "discretionary" acts that the discretionary-function exception was meant to immunize. This is an independent reason for reversing the decisions below.

6.1 *Gaubert* — The Centrality of Policy

This Court's decision in *U.S. v. Gaubert*, 499 U.S. 315 (1991) alone shows this to be true. *Gaubert* shows that, in this case, the TVA is subject to suit. "[W]hen properly construed," *Gaubert* explains, "the [discretionary-function] exception 'protects only governmental actions and decisions based on considerations of public policy.'" *Id.* at 323 (quoting *Berkovitz*, 486 U.S. at 537). The TVA's misconduct here centrally involves installing power lines. Not the managerial decisions behind that work. But, very precisely, the nuts-and-bolts, on-the-ground, mostly physical work of safely raising a power line.[13] That work did not involve the assessment of "social, economic, [or] political policy." *See id.* Nor would the Thackers' lawsuit involve the "judicial 'second-guessing' of legislative and administrative decisions." *See id.* (quoting *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984)). The TVA's challenged acts were not "policy"-related in any meaningful sense. Rather,

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[13] "Before applying the [discretionary-function] test," a court "must first identify 'exactly what conduct is at issue.'" Pet. App. 6a (quoting *Swafford v. United States*, 839 F.3d 1365, 1370 (11th Cir. 2016)).

those acts were garden-variety safety work. That is not the type of work that the discretionary-function exception was "designed to shield."

6.2 Analogies from *Gaubert*

Analogies from *Gaubert* confirm this conclusion. The TVA's work here is like conduct that the *Gaubert* Court expressly said does not fall within the discretionary-function exception — and that therefore does not enjoy immunity. In this respect, *Gaubert* should have controlled the lower courts' analyses.

First, *Gaubert* explained that the discretionary-function exception would not shield a government agent who negligently caused a car accident. *Gaubert*, 499 U S. at 325 n.7. The *Gaubert* Court wrote:

> There are obviously discretionary acts performed by a Government agent that are within the scope of his employment but not within the discretionary function exception because these acts cannot be said to be based on the purposes that the regulatory regime seeks to accomplish. If one of the officials involved in this case drove an automobile on a mission connected with his official duties and negligently collided with another car, the exception would not apply. Although driving requires the constant exercise of discretion, the official's decisions in exercising that discretion *can hardly be said to be grounded in regulatory policy.*

Id. (emphasis added). The Court's language applies here. Although installing power lines and raising downed ones "requires the constant exercise of [ground-level] discretion," carrying out that work — *i.e.*, physically putting lines up or getting them safely out of the water — "can hardly be said to be grounded in regulatory policy." *See id.* Safely driving a car involves essentially the same sort of functional judgment that raising power lines does. Neither is work that § 2680(a) was designed to immunize.

A second concrete analogy lies in *Gaubert's* discussion of *Indian Towing Co. v. United States*, 350 U.S. 61 (1955). *See Gaubert*, 499 U.S. at 326. In *Indian Towing*,

> the Coast Guard had negligently failed to maintain a lighthouse by allowing the light to go out. The United States was held liable . . . because *making sure the light was operational did not involve any permissible exercise of policy judgment.*

Gaubert, 499 U.S. at 326 (quoting *Berkovitz*, 486 U.S. at 538 n. 3) (emphasis added). The relevance to this case is again plain. It is hard to see how "operational[ly]" ensuring that a lighthouse worked is pertinently different from ensuring that a fallen power line is raised safely. Both embody wholly functional, on-the-ground work. Neither "can be said to be grounded in the policy of the regulatory regime," *id.* at 325, in any significant way.

6.3 Qualifications

Some points should now be emphasized. This analysis does not fall into mistakes that *Gaubert* identified. We thus recognize with *Gaubert* that some "operational"-level conduct can embody "discretionary functions" under § 2680(a). *See id.* at 325–27. We are not arguing that "discretionary" work is limited "exclusively to policymaking or planning functions." *Id.* at 325. We are arguing only that the ground-level work in this case was not the type that the discretionary-function exception was "designed to . . . shield[]."

But a converse point also holds. It cannot be the case — given the *Gaubert* Court's reasoning — that *all* "acts of negligence which occur in the course of day-to-day activities" are necessarily discretionary. That would be as coarse and unwarranted a rule as the "nonexistent" discretionary–operational "dichotomy" that *Gaubert* rejected. *See id.* at 325–26. Here, too, doctrine must be more nuanced. Some operational activities may be discretionary — like the bank-management work in *Gaubert*. *See id.* at 327–29. Other ground-level operations may not be meaningfully discretionary — such as the negligent car driving that *Gaubert* gives as an example; or the faulty lighthouse maintenance in *Indian Towing*; or the TVA's safety work here.

Run-of-the-mill light-industrial work — like the on-the-ground work that the TVA did here — is not the sort of thing that is meant to escape the FTCA's immunity waiver. The core point of the FTCA, and its discretionary-function exception, is indeed to the

contrary. Such wholly functional work — of just the sort that would attract a cogent tort claim if done negligently by a private actor — is exactly where the FTCA meant to extend governmental liability. If the TVA's challenged work in this case does fall into the discretionary-function exception, moreover, then it is hard to imagine what falls outside it. The Court will pardon the worn term — but it does apply: Under the lower courts' holdings, the discretionary-function exception threatens to swallow the TVA's normally "broad" sue-and-be-sued clause. The lower courts' analyses are mistaken and should be vacated.

CONCLUSION

The Court should grant this petition for a writ of certiorari.

Respectfully submitted,

Franklin T. Rouse
Counsel of Record
CONCHIN CLOUD & COLE, LLC
2404 Commerce Court, S.W.
Huntsville, Alabama 35801
(256) 705-7777
taylor@conchincloudcole.com
Counsel for Petitioners

February 26, 2018

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ENTERED AUGUST 22, 2017

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-15105

D.C. Docket No. 5:15-cv-01232-AKK

GARY THACKER,
VENIDA L. THACKER,

Plaintiffs-Appellants,

versus

TENNESSEE VALLEY AUTHORITY,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Alabama

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(August 22, 2017)

Before ED CARNES, Chief Judge, and ROSENBAUM and DUBINA, Circuit Judges.

PER CURIAM:

Gary and Venida Thacker sued the Tennessee Valley Authority ("TVA") for its alleged negligence involving a tragic accident on the Tennessee River. On July 30, 2013, while Gary Thacker and his friend Anthony Szozda were participating in a local fishing tournament, TVA was attempting to raise a downed power line that was partially submerged in the river. The power line, which crossed the river, had become lax earlier in the day when a pulling cable failed during a conductor- replacement project. At the same moment that TVA began lifting the conductor out of the water, the fishing partners' boat passed through the area at a high rate of speed, and the conductor struck both Thacker and Szozda. As a result, according to the complaint, Thacker suffered serious physical injuries, his wife suffered loss- of-consortium damages, and Szozda was killed instantly.

The district court dismissed the Thackers' complaint for lack of subject- matter jurisdiction. We now must affirm.

The Thackers assert that the district court erred in two ways: (1) in the Thackers' view, the discretionary-function exception to the government's sovereign-immunity waiver in the TVA Act cannot apply to TVA's activities at issue here; and (2) even if the exception applies, the challenged

conduct does not fall within it. We address the Thackers' arguments in order.

I.

When we review a district court's decision to grant a motion to dismiss under Rule 12(b)(1), Fed. R. Civ. P., for lack of subject-matter jurisdiction, we review its legal conclusions, which are all that are at issue here, *de novo*. *McElmurray v. Consol. Gov't of Augusta-Richmond Cty.*, 501 F.3d 1244, 1250 (11th Cir. 2007).

II.

The United States enjoys sovereign immunity from suit unless it unequivocally waives it in statutory text. *Lane v. Pena*, 518 U.S. 187, 192 (1996) (citation omitted). When Congress waives sovereign immunity, we must strictly construe that waiver, in terms of its scope, in favor of the United States. *See id.* (citation omitted).

Yet we have recognized that the doctrine of sovereign immunity does not entirely bar suit against TVA, *Peoples Nat'l Bank of Huntsville, Ala. v. Meredith*, 812 F.2d 682, 684-85 (11th Cir. 1987) (citing 16 U.S.C. § 831c(b)), a corporate agency of the United States that is expressly authorized to engage in commercial, power-generating activities, among other functions, 16 U.S.C. §§ 831c(j), 831d(*l*), 831k; *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 127 (1939) ("The [TVA] Act erects a corporation, an instrumentality of the United States, to develop by a series of dams on the

Tennessee River and its tributaries a system of navigation and flood control and to sell the power created by the dams." (footnote omitted)). Rather, the TVA Act expressly provides that TVA "[m]ay sue and be sued in its corporate name." 16 U.S.C. § 831c(b). Though "sue-and-be-sued" waivers are liberally construed, *Loeffler v. Frank*, 486 U.S. 589, 554 (1988) (quoting *Fed. Hous. Admin., Region No. 4 v. Burr*, 309 U.S. 242, 245 (1940)), courts have interpreted this language to mean that TVA is "liable to suit in tort, subject to certain exceptions." *United States v. Smith*, 499 U.S. 160, 168-69 (1991) (citing *Meredith*, 812 F.2d at 684-85; *Queen v. Tenn. Valley Auth.*, 689 F.2d 80, 85 (6th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983)).

As relevant here, we have held that TVA cannot be subject to liability when engaged in governmental functions that are discretionary in nature. *Meredith*, 812 F.2d at 685. And we have specifically applied the discretionary-function exception in cases arising out of TVA's commercial, power-generating activities. *See, e.g., Johns v. Pettibone Corp.*, 843 F.2d 464, 466–67 (11th Cir. 1988) (negligence suit arising out of electrocution death caused by a TVA power transmission line).

We must do so here as well because TVA's challenged actions occurred in the context of its performance of a governmental function. Under the TVA Act, TVA has the "power to acquire real estate for the construction of . . . transmission lines, power houses, and other structures . . . , and in the event that the owner or owners of such property shall fail and refuse to sell to [TVA] at a price

deemed fair and reasonable . . . , then [TVA] *may* . . . *exercise the right of eminent domain* . . .." 16 U.S.C. § 831c(i) (emphasis added); *see also id.* at § 831c(h) (TVA "[s]hall have power *in the name of the United States of America* to exercise the right of eminent domain . . . .") (emphasis added).

The power of eminent domain that TVA may exercise when it constructs power-transmission lines, of course, belongs solely to the United States, not to commercial entities. Since TVA can exercise that power when it constructs power- transmission lines, we conclude that it acts as an agency of the United States when constructing power-transmission lines. *Cf. Lynn v. United States*, 110 F.2d 586, 590 (5th Cir. 1940) ("In the erection of dams [TVA] is only an agency of the United States.") (citing 16 U.S.C. § 831c(h), (i), (k)). Because the construction of power lines is a governmental activity, TVA cannot be sued for actions arising out of that activity if those actions fall within the discretionary-function exception. *See Meredith*, 812 F.2d at 685–86.

The Thackers' allegation that TVA negligently "failed to exercise reasonable care in the assembly and installation of power lines across the Tennessee River" is encompassed within TVA's construction of power-transmission lines. And their contention that TVA "failed to exercise reasonable care in warning boaters on the Tennessee River of the hazards the TVA created" allegedly occurred incident to TVA's construction of power-transmission lines. As a result, we must determine

whether TVA's challenged actions fall within the discretionary-function exception.

III.

To determine whether TVA is shielded from liability under the discretionary-function exception based on the challenged conduct, we use the same test that applies when the government invokes the discretionary-function exception to the Federal Tort Claims Act ("FTCA"). *See, e.g.*, *Bobo v. Tenn. Valley Auth.*, 855 F.3d 1294, 1310 (11th Cir. 2017) (relying on cases analyzing the FTCA's discretionary-function exception to evaluate the exception's applicability in a lawsuit against TVA).

Before applying the test, however, we must first identify "exactly what conduct is at issue." *Swafford v. United States*, 839 F.3d 1365, 1370 (11th Cir. 2016) (citation and quotation marks omitted). As we have noted, the Thackers allege that TVA negligently "(1) failed to exercise reasonable care in the assembly and installation of power lines across the Tennessee River, and (2) failed to exercise reasonable care in warning boaters on the Tennessee River of the hazards the TVA created."

Having identified the challenged actions, we apply a two-part test to that conduct to ascertain whether the conduct falls within the bounds of the discretionary-function exception. *Id.* At the first step, we evaluate whether the conduct at issue "is a matter of choice for the acting employee." *Id.* (quoting *Berkovitz ex rel. Berkovitz v. United States*,

486 U.S. 531, 536 (1988) (internal quotation marks omitted)). An action is not a matter of choice—and therefore not discretionary—"when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Id.* (quoting *Berkovitz*, 486 U.S. at 536 (internal quotation marks omitted)). Under those circumstances, an employee is required to follow the directive, meaning that the employee's actions are not discretionary and do not fall within the discretionary-function exception. *Id.*

Here, the Thackers point to no specific federal statute, regulation, or policy that sets forth a particular course of action for employees raising a power line from a river to follow, either in the construction of the line or in safety precautions to undertake to protect the public. Instead, for the first time in their reply brief, the Thackers cite generally 29 C.F.R. § 1926, a group of regulations that concerns safety and health regulations for construction. But arguments raised for the first time in a reply brief are not properly before this Court. *Herring v. Sec'y, Dep't. of Corr.*, 397 F.3d 1338, 1342 (11th Cir. 2005) (citations omitted).

And even if we were to address the Thackers' argument, their general citation to § 1926 is inadequate. Section 1926 consists of multiple subparts governing items varying from fire protection and prevention (29 C.F.R. §§ 1926.150-1926.155) to fall protection (29 C.F.R. §§ 1926.500-1926.503) to stairways and ladders (29 C.F.R. §§ 1926.1050-1926.1060) to toxic and hazardous substances (29 C.F.R. §§ 1926.1100-1926.1153). So even if we ignored the lateness of

the Thackers' reliance on § 1926, they have not pointed to a specific regulation that TVA allegedly transgressed. This does not suffice. Under these circumstances, the first step of the discretionary-function test is satisfied.

At the second step, we consider whether the conduct at issue involves the kind of judgment designed to be shielded by the discretionary-function exception. *Swafford*, 839 F.3d at 1370. "[T]he purpose of the exception is to prevent judicial 'second-guessing' of . . . administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *United States v. Gaubert*, 499 U.S. 315, 322 (1991) (quoting *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984)). For this reason, the discretionary-function exception applies to only that conduct "that involves the permissible exercise of policy judgment." *Berkovitz*, 486 U.S. at 539. This type of conduct, in turn, concerns "governmental actions and decisions based on considerations of public policy." *Id.* at 537 (citation omitted); *see also Gaubert*, 499 U.S. at 322-23.

In this case, the challenged actions plainly involved public-policy considerations. The challenged actions and decisions in this case could require TVA to consider, among other things, its allocation of resources (such as personnel and time), public safety, cost concerns, benefits, and environmental impact. *See OSI, Inc. v. United States*, 285 F.3d 947, 950–51 (11th Cir. 2002) ("The exception does not require there to have been actual weighing of policy considerations.") (quotation marks

omitted). As a result, the second step of the discretionary- function exception is also satisfied, and the exception applies.

IV.

For these reasons, we affirm the district court's dismissal for lack of subject- matter jurisdiction.

AFFIRMED.

ENTERED August 22, 2017

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 16-15105

District Court Docket No.
5:15-cv-01232-AKK

GARY THACKER, VENIDA L. THACKER,

Plaintiffs - Appellants,

versus

TENNESSEE VALLEY AUTHORITY,

Defendant - Appellee.

Appeal from the United States District Court for the
Northern District of Alabama

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: August 22, 2017
For the Court: DAVID J. SMITH, Clerk of Court
By: Jeff R. Patch

ENTERED May 23, 2016

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
ALABAMA NORTHEASTERN DIVISION**

GARY THACKER and VENIDA L. THACKER,	)	
Plaintiffs,	)	
	)	Civil Action Number
vs.	)	**5:15-cv-1232-AKK**
TENNESSEE VALLEY AUTHORITY,	)	
Defendant.	)	

ORDER

Gary Thacker and Venida L. Thacker bring this action against the Tennessee Valley Authority ("TVA") alleging negligence and wantonness arising from an accident that occurred on the Tennessee River in July 2013. *See generally* doc. 1. Specifically, the Thackers allege that they sustained injuries due to the TVA's negligence in supervising and training its employees, as well as its failure to implement policies instructing employees on the proper response to emergencies. Doc. 1. The TVA has moved to dismiss this complaint, doc. 11, contending that because the complaint concerns personal injuries arising out of the TVA's response to an emergency

created during maintenance of its electrical power lines, this court lacks subject matter jurisdiction under the discretionary function doctrine.[1]

A motion to dismiss filed under Fed. R. Civ. P. 12(b)(1) may be based upon either a facial or factual challenge to the complaint. *McElmurray v. Consolidated Gov't of Augusta-Richmond Cty*, 501 F.3d 1244 (11th Cir. 2007). Where the challenge is facial, the court must merely "see if [the] plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion." *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990). By contrast, where the challenge is factual, as it is here, the existence of subject matter jurisdiction is considered irrespective of the pleadings, "and matters outside the pleadings, such as testimony and affidavits are considered." *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981) (citing *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980)).

The TVA is a "constitutionally authorized corporate agency and instrumentality of the United States." *Bobo v. AGCO Corp.*, 981 F. Supp. 2d 1130,1137 (N.D. Ala. Oct. 29, 2013); *see also* 16 U.S.C. § 831 *et seq.* (1933). While the Thackers are correct that the TVA does not enjoy sovereign immunity, *see* 16 U.S.C. § 831c(b), they overlook that, "[w]hen TVA is engaged in a governmental function that is discretionary in nature, where the

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[1] The court also has for consideration the Defendant's Motion for Leave to File Excess Pages, doc. 18, which is **GRANTED**.

United States itself would not be liable, TVA cannot be subject to liability." *Hill v. Tenn. Valley Auth.*, 842 F. Supp. 1413, 1420 (N.D. Ala. 1993). *See also U.S. v. Smith*, 699 U.S. 160, 168 (1991) (noting that the TVA is "liable to suit in tort subject to certain exceptions."). Whether the TVA is entitled to the discretionary function exception depends on two things: (1) whether the challenged act or omission violated a mandatory statute, regulation, or policy that allowed no judgment or choice; and (2) if the challenged conduct is discretionary, i.e., that there is no mandatory policy regarding a particular course of action, whether the conduct is the kind the discretionary function exception was designed to shield. *See U.S. v. Gaubert*, 499 U.S. 315, 322–3 (1991). Basically, "[f]or a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime." *Id.* at 324–25. If a mandatory statute, regulation, or policy exists, then the discretionary function exception would not apply because "conduct cannot be discretionary unless it involves an element of judgment or choice." *Berkovitz by Berkovitz v. U.S.*, 486 U.S. 531, 536 (1988).

Turning to the allegations here, because the conduct is the TVA's response to an emergency that created a hazard to boaters on the Tennessee River, rather than a purported failure to carry out the mandate of its existing policy, doc. 1 at 3–7, the first part of the *Gaubert* discretionary test is satisfied. Moreover, as to the second part, it is axiomatic "that safety decisions represent an exercise of

discretion giving rise to governmental immunity." *Johns v. Pettibone Corp.*, 843 F.2d 464, 467 (11th Cir. 1988). *See also Slappey v. U.S. Army Corps of Engineers*, 571 F. App'x 855, 860 (11th Cir. 2014) ("an agency's decision whether to warn, and how to warn, implicates policy concerns for purposes of the discretionary function analysis."); *Monzon v. United States*, 253 F.3d 567, 572 (11th Cir. 2001) (decision whether to warn about rip currents is a discretionary function). Therefore, absent a policy mandating the manner in which the TVA should respond to water hazard emergencies,[2] doc. 12-1 at 3, the court finds that the TVA's actions in responding to the river incident here are clearly discretionary as they involve some judgment and choice. Accordingly, the court finds that the conduct here is the type that the discretionary function exception was designed to protect, and that the complaint is due to be dismissed for lack of subject matter jurisdiction. *Hughes v. United States*, 110 F.3d 765, 767 n.1 (11th Cir. 1997) (The court does not look to see "whether the allegations of negligence are true," but "whether the nature of the conduct involves judgment or choice and whether that judgment is of the kind that the exception was designed to protect.").

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[2] The Thackers' complaint does not identify a statute, regulation, or mandate that TVA was required to follow and instead relies on the TVA's decision not to place warning flags or buoys in the area. Doc. 1 at 5–6

For these reasons, the TVA's motion to dismiss, doc. 11, is **GRANTED**, and this matter is **DISMISSED** without prejudice for lack of subject matter jurisdiction.

DONE the 23rd day of May, 2016.

/s/
ABDUL K. KALLON
UNITED STATES DISTRICT JUDGE

ENTERED November 28, 2017

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 16-15105-CC

GARY THACKER,
VENIDA L. THACKER,

Plaintiffs - Appellants,

versus

TENNESSEE VALLEY AUTHORITY,

Defendant - Appellee.

Appeal from the United States District Court for the Northern District of Alabama

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BEFORE: ED CARNES, Chief Judge, and ROSENBAUM and DUBINA, Circuit Judges.

PER CURIAM:

The petition(s) for panel rehearing filed by Gary Thacker and Venida L. Thacker is DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

16 U.S.C. § 831c. Corporate powers generally; eminent domain; construction of dams, transmission lines, etc.

Except as otherwise specifically provided in this Act, the Corporation—

(a) Shall have succession in its corporate name.

(b) May sue and be sued in its corporate name.

(c) May adopt and use a corporate seal, which shall be judicially noticed.

(d) May make contracts, as herein authorized.

(e) May adopt, amend, and repeal bylaws.

(f) May purchase or lease and hold such real and personal property as it deems necessary or convenient in the transaction of its business, and may dispose of any such personal property held by it.

The Board shall select a treasurer and as many assistant treasurers as it deems proper: Provided, that any member of said Board may be removed from office at any time by a concurrent resolution of the Senate and the House of Representatives.

(f) Shall have such powers as may be necessary or appropriate for the exercise of the powers herein specifically conferred upon the Corporation.

(h) Shall have power in the name of the United States of America to exercise the right of eminent domain, and in the purchase of any real estate or the acquisition of real estate by condemnation proceedings, the title to such real estate shall be taken in the name of the United States of America, and thereupon all such real estate shall be entrusted to the Corporation as the agent of the United States to accomplish the purposes of this Act.

(i) Shall have power to acquire real estate for the construction of dams, reservoirs, transmission lines, power houses, and other structures, and navigation projects at any point along the Tennessee River, or any of its tributaries, and in the event that the owner or owners of such property shall fail and refuse to sell to the Corporation at a price deemed fair and reasonable by the Board, then the Corporation may proceed to exercise the right of eminent domain, and to condemn all property that it deems necessary for carrying out the purposes of this Act, and all such condemnation proceedings shall be had pursuant to the provisions and requirements hereinafter specified, with reference to any and all

condemnation proceedings: Provided, That nothing contained herein or elsewhere in this Act shall be construed to deprive the Corporation of the rights conferred by the Act of February 26, 1931 (46 Stat. 1422, ch. 307, secs. 1 to 5, inclusive), as now compiled in section 258a-258e, inclusive, of Title 40 of the United States Code.

(j) Shall have power to construct such dams, and reservoirs, in the Tennessee River and its tributaries, as in conjunction with Wilson Dam, and Norris, Wheeler, and Pickwick Landing Dams, now under construction, will provide a nine-foot channel in the said river and maintain a water supply for the same, from Knoxville to its mouth, and will best serve to promote navigation on the Tennessee River and its tributaries and control destructive flood waters in the Tennessee and Mississippi River drainage basins; and shall have power to acquire or construct power houses, power structures, transmission lines, navigation projects, and incidental works in the Tennessee River and its tributaries, and to unite the various power installations into one or more systems by transmission lines.

(k) Shall have power in the name of the United States —

(a) to convey by deed, lease, or otherwise, any real property in the possession of or under the control of the Corporation to any person or persons, for the purpose of recreation or use as a summer residence, or for the operation on such premises of pleasure resorts for boating, fishing, bathing, or any similar purpose;

(b) to convey by deed, lease, or otherwise, the possession and control of any such real property to any corporation, partnership, person, or persons for the purpose of erecting thereon docks and buildings for shipping purposes or the manufacture or storage thereon of products for the purpose of trading or shipping in transportation: Provided, That no transfer authorized herein in (b) shall be made without the approval of Congress: And provided further, That said corporation, without further action of Congress, shall have power to convey by deed, lease, or otherwise, to the Ingalls Shipbuilding Corporation, a tract or tracts of land at or near Decatur, Alabama, and to the Commercial Barge Lines, Inc., a tract or tracts of land at or near Guntersville, Alabama;

(c) to transfer any part of the possession and control of the real estate now in possession of and under the control of said Corporation to any other department, agency, or instrumentality of the United

States: Provided, however, That no land shall be conveyed, leased, or transferred, upon which there is located any permanent dam, hydroelectric power plant, or munitions plant heretofore or hereafter built by or for the United States or for the Authority, except that this prohibition shall not apply to the transfer of Nitrate Plant Numbered 1, at Muscle Shoals, Alabama, or to Waco Quarry: And provided further, That no transfer authorized herein in (a) or (c), except leases for terms of less than twenty years, shall be made without the approval of the President of the United States, if the property to be conveyed exceeds $ 500 in value; and

(d) to convey by warranty deed, or otherwise, lands, easements, and rights-of-way to States, counties, municipalities, school districts, railroad companies, telephone, telegraph, water, and power companies, where any such conveyance is necessary in order to replace any such lands, easements, or rights-of-way to be flooded or destroyed as the result of the construction of any dam or reservoir now under construction by the Corporation, or subsequently authorized by Congress, and easements and rights-of-way upon which are located transmission or distribution lines. The Corporation shall also have power to convey or lease Nitrate Plant

Numbered 1, at Muscle Shoals, Alabama, and Waco Quarry, with the approval of the War Department and the President.

(l) Shall have power to advise and cooperate in the readjustment of the population displaced by the construction of dams, the acquisition of reservoir areas, the protection of watersheds, the acquisition of rights-of-way, and other necessary acquisitions of land, in order to effectuate the purposes of this Act; and may cooperate with Federal, State, and local agencies to that end.

28 U.S.C. § 1346. United States as a defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which

are subject to sections 7104(b)(1) and 7107(a)(1) of title 41. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b)

(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of title 18).

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1954.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or

interest in real property in which an interest is claimed by the United States.

(g) Subject to the provisions of chapter 179, the district courts of the United States shall have exclusive jurisdiction over any civil action commenced under section 453(2) of title 3, by a covered employee under chapter 5 of such title.

28 U.S.C. § 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)

(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)

(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney

General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his

office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

28 U.S.C. § 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to--

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

(d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) [Repealed]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for co-operatives.

No. 17-1201

In the Supreme Court of the United States

GARY THACKER AND VENIDA L. THACKER, PETITIONERS

v.

TENNESSEE VALLEY AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE TENNESSEE VALLEY AUTHORITY IN OPPOSITION

SHERRY A. QUIRK
General Counsel
DAVID D. AYLIFFE
Associate General Counsel
JAMES S. CHASE
Senior Attorney
Tennessee Valley Authority
Knoxville, TN 37902

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the Tennessee Valley Authority (TVA), a wholly owned corporate agency and instrumentality of the United States, may under certain circumstances invoke immunity for its performance of governmental, discretionary functions, including the TVA's statutory authority to construct and repair electric power-transmission infrastructure.

2. Whether the court of appeals correctly held that the TVA is immune for its activities in the specific facts of this case.

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In the Supreme Court of the United States

No. 17-1201

GARY THACKER AND VENIDA L. THACKER, PETITIONERS

v.

TENNESSEE VALLEY AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE TENNESSEE VALLEY AUTHORITY IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 868 F.3d 979. The opinion of the district court is reported at 188 F. Supp. 3d 1243 (Pet. App. 12a-16a).

JURISDICTION

The judgment of the court of appeals (Pet. App. 10a-11a) was entered on August 22, 2017. A petition for rehearing was denied on November 28, 2017 (Pet. App. 17a). The petition for a writ of certiorari was filed on February 26, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Tennessee Valley Authority (TVA) is "a wholly owned public corporation of the United States," *TVA* v. *Hill*, 437 U.S. 153, 157 (1978), created by the Tennessee Valley Authority Act of 1933 (TVA Act), 16 U.S.C. 831

et seq. Congress has directed the TVA to act "in the interest of the National defense and for agricultural and industrial development, and to improve navigation in the Tennessee River and to control the destructive flood waters in the Tennessee River and Mississippi River Basins." 16 U.S.C. 831; see 16 U.S.C. 831n-4(h), 831dd; *United States ex rel. TVA* v. *Welch*, 327 U.S. 546, 553 (1946).

As part of the TVA's mission, Congress has authorized the TVA to construct and repair electric power infrastructure in the Tennessee Valley "for the advancement of the national defense and the physical, social and economic development of the area in which it conducts its operations." 16 U.S.C. 831n-4(h). The TVA may thus construct hydroelectric power plants at dams on the Tennessee River, thereby enabling "the generation of electric energy" in addition to "regulat[ing] the stream flow * * * for the purposes of promoting navigation and controlling floods." 16 U.S.C. 831h-1. Congress also has authorized the TVA to "construct * * * transmission lines * * * in the Tennessee River and its tributaries." 16 U.S.C. 831c(j). As part of that authority, the TVA may "exercise the right of eminent domain" and "condemn all property that it deems necessary" for its purposes. 16 U.S.C. 831c(i). Title to all real property deemed necessary to accomplish the purposes of the Act is held in the name of the United States and the property is "entrusted to [the TVA] as the agent of the United States to accomplish the purposes of [the TVA Act]." 16 U.S.C. 831c(h).

The TVA's operations are an essential part of the Nation's electric power supply. See Pet. 7 n.3. As of 2015, the TVA supplied power to more than nine million customers in seven states. See *ibid.*

2. On July 30, 2013, the TVA was replacing an overhead conductor on a transmission line spanning Wheeler Reservoir—a body of water created by the Wheeler Dam—on the Tennessee River. Compl. ¶ 8. At approximately 2:40 p.m., a pulling cable failed, releasing the tension on the line and allowing it to fall into the water between the towers. *Id.* ¶ 10.

At 3:10 p.m., the TVA informed the U.S. Coast Guard of the situation, and the Coast Guard established a Marine Safety Zone prohibiting all vessels from entering the Tennessee River between miles 297 and 298. C.A. App. 48, ¶ 5 (Carman Declaration). At 3:40 p.m., the Coast Guard broadcast notice of the Marine Safety Zone and the closure of the River on marine radio. *Ibid.* The Coast Guard reissued the Notice hourly thereafter in accordance with the regular schedule for such notices. *Ibid.* Entry into the area without Coast Guard authorization was a violation of federal law. See 33 C.F.R. 165.20, 165.23.

At 5:30 p.m., Petitioner Gary Thacker and a passenger began travelling downstream from Ingalls Harbor, approximately five miles upriver from the downed conductor. Compl. ¶ 16. Thacker's boat travelled at high speed, reaching the downed conductor in about five minutes. *Id.* ¶ 17.

The TVA had two patrol boats at the site of the downed conductor. Compl. ¶ 15. But Wheeler Reservoir is over one mile wide at that location. *Id.* ¶ 14. As a result of the speed of Thacker's boat and the patrol patterns of the patrol boats, neither patrol boat was able to stop Thacker's boat from reaching the downed line. *Id.* ¶ 12; C.A. App. 48-49, ¶¶ 6-7. At the time, the TVA was in the process of pulling the conductor out of the water, and the line was still low over the surface of

the water. Compl. ¶ 18. Thacker's boat struck the line, "[i]nstead of being able to pass safely over it." *Ibid.* His passenger was killed and Thacker suffered physical injuries. *Ibid.*

3. Thacker and his wife filed suit under common-law theories of negligence and wantonness. Compl. ¶¶ 27, 30. The complaint alleged that the "TVA should have instituted heightened and stringent criteria for contractors to qualify to perform boat patrol activities," and that it "should have instituted and/or required training for contractors in the proper procedures to patrol boat traffic on the Tennessee River in the event of any emergency situation." *Id.* ¶ 6. The complaint further alleged that the TVA had breached a "duty to exercise reasonable care in warning boaters on the Tennessee River of the hazards it created," and "to exercise reasonable care in the assembly and installation of the power lines across the Tennessee River." *Id.* ¶ 25.

The district court granted the TVA's motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), holding that the TVA is immune from petitioners' suit.[1] Pet. App. 13a-14a, 16a. The court noted that while the TVA Act authorizes the TVA to "sue and be sued in its corporate name," 16 U.S.C. 831c(b), thereby generally waiving sovereign immunity to tort suits, that liability is "subject to certain exceptions," Pet. App. 14a (quoting *United States* v. *Smith*, 499 U.S. 160, 169 (1991)). One exception recognized by the Eleventh Circuit is im-

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[1] The Eleventh Circuit has held, unlike some other circuits, that the application of immunity results in a dismissal for lack of subject matter jurisdiction. See, *e.g.*, *United States Aviation Underwriters, Inc.* v. *United States*, 562 F.3d 1297, 1299 (11th Cir.) (per curiam), cert. denied, 558 U.S. 1024 (2009).

munity for the TVA for its performance of certain governmental, discretionary functions. See *ibid.* Applying this Court's two-part test from *United States* v. *Gaubert*, 499 U.S. 315, 322-323 (1991), and *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988), the district court then held that the TVA was immune because the conduct challenged here—including the TVA's safety decisions in response to a water-hazard emergency—(1) did not violate a mandatory statute, regulation, or policy that allowed no judgment or choice; and (2) was the kind of conduct protected by the discretionary function exception. Pet. App. 14a-15a. The court stated that it is "axiomatic 'that safety decisions represent an exercise of discretion giving rise to governmental immunity.'" *Ibid.* (quoting *Johns* v. *Pettibone Corp.*, 843 F.2d 464, 467 (11th Cir. 1988)).

The court of appeals affirmed. Pet. App. 1a-11a. The court recognized this Court's holdings in *Loeffler* v. *Frank*, 486 U.S. 549, 554 (1988), and *Federal Housing Administration* v. *Burr*, 309 U.S. 242, 245 (1940), that "'sue-and-be-sued' waivers are liberally construed," Pet. App. 4a (citation omitted), as well as this Court's statement in *Smith* that the TVA is "liable to suit in tort, subject to certain exceptions," *ibid.* (quoting *Smith*, 499 U.S. at 168-169). The court of appeals also noted its own precedent—cited by this Court in *Smith*—that the TVA is immune "when engaged in governmental functions that are discretionary in nature." *Ibid.* (citing *Peoples Nat'l Bank* v. *Meredith*, 812 F.2d 682, 685 (11th Cir. 1987)). The court of appeals concluded that, here, the "TVA's challenged actions occurred in the context of its performance of a governmental function." *Ibid.* Specifically, the TVA "acts as an agency of the United

States when constructing power-transmission lines" because Congress has given the TVA authority to exercise the power of eminent domain when performing that function, and only the United States has eminent domain power. *Id.* at 5a. The court thus held that the TVA was entitled to assert discretionary function immunity against petitioners' allegation that the TVA had "failed to exercise reasonable care in the assembly and installation of power lines across the Tennessee River." *Ibid.* Furthermore, the court held that petitioners' allegations that the TVA had "failed to exercise reasonable care in warning boaters on the Tennessee River of the hazards the TVA created" concerned activities that were also "incident to TVA's construction of power-transmission lines," and thus within the TVA's governmental functions. *Ibid.*

The court of appeals then applied this Court's two-step analysis from *Gaubert* and *Berkovitz* and held that the alleged conduct in this case fell within the TVA's immunity for discretionary actions. Pet. App. 6a-8a. The court of appeals stated that petitioners had "point[ed] to no specific federal statute, regulation, or policy that sets forth a particular course of action for employees raising a power line from a river to follow, either in the construction of the line or in safety precautions to undertake to protect the public." *Id.* at 7a. At the second step, the court stated that the discretionary function exception is designed "to prevent judicial 'second-guessing' of . . . administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Id.* at 8a (quoting *Gaubert*, 499 U.S. at 322). The court concluded that that test was satisfied here because "[t]he challenged actions and decisions in this case could require TVA to consider, among other

things, its allocation of resources (such as personnel and time), public safety, cost concerns, benefits, and environmental impact." *Ibid.*

The court of appeals denied petitioners' petition for panel rehearing. Pet. App. 17a.

ARGUMENT

The court of appeals correctly rejected petitioners' contention that the TVA cannot assert immunity even for its discretionary, governmental functions because the TVA Act's sue-and-be-sued clause does not expressly incorporate a discretionary function exception. As this Court has explained, the discretionary function exception preserving immunity for governmental activities is a longstanding rule implied from separation-of-powers principles, and the exception properly applies here under this Court's precedents. Contrary to petitioners' contention, there is no genuine circuit conflict that warrants this Court's review: the two circuit court decisions cited by petitioners holding that the TVA was not entitled to immunity involved different legal claims arising from different TVA functions that the courts of appeals considered "commercial" rather than governmental. Petitioners have not identified any case rejecting immunity for the TVA in circumstances analogous to the emergency-management protocols challenged here. Moreover, this case would not be a suitable vehicle for resolving the scope of immunity under the TVA Act because the TVA is immune from this suit in any event under the Suits in Admiralty Act (SIAA), 46 U.S.C. 30901 *et seq.*

Petitioners also argue that the court of appeals erred in its application of this Court's two-part discretionary function test to the facts of this case. That fact-bound

conclusion was correct and does not warrant this Court's review.

1. a. The court of appeals correctly concluded that the TVA may assert immunity for its governmental, discretionary actions in this case. That is, the TVA, like other government agencies and entities, is immune for decisions that are not compelled by any statute or regulation and that implicate governmental policy functions.

The TVA Act provides that the TVA may "sue and be sued in its corporate name," 16 U.S.C. 831c(b), which, as this Court has explained, "[c]ourts have read" to "mak[e] the TVA liable to suit in tort, *subject to certain exceptions*." *United States* v. *Smith*, 499 U.S. 160, 168-169 (1991) (emphasis added). The Court in *Smith* cited decisions from the Eleventh and Sixth Circuits—the two circuits that encompass the vast majority of the Tennessee Valley region—authorizing the TVA to assert immunity for discretionary, governmental functions. *Ibid.* (citing *Peoples Nat'l Bank* v. *Meredith*, 812 F.2d 682, 684-685 (11th Cir. 1987); *Queen* v. *TVA*, 689 F.2d 80, 85 (6th Cir. 1982), cert. denied, 460 U.S. 1082 (1983)). Subsequent decisions from the Eleventh and Sixth Circuits adhere to the holding that the TVA may invoke the discretionary function exception. See *Bobo* v. *TVA*, 855 F.3d 1294, 1309 (11th Cir. 2017); *Edwards* v. *TVA*, 255 F.3d 318, 320 (6th Cir. 2001).

i. The court of appeals' conclusion that the TVA may assert immunity under certain circumstances for discretionary actions taken in a governmental capacity is consistent with this Court's decisions addressing implied exceptions to sue-and-be-sued clauses, such as *Federal Housing Administration* v. *Burr*, 309 U.S. 242, 245 (1940), *Loeffler* v. *Frank*, 486 U.S. 549, 554-556 (1988), and *FDIC* v. *Meyer*, 510 U.S. 471, 480 (1994).

Those decisions establish that the "general authority to 'sue and be sued' [may] be delimited by implied exceptions" if it is "clearly shown [1] that certain types of suits are not consistent with the statutory or constitutional scheme, [2] that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or [3] that for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense." *Burr*, 309 U.S. at 245 (footnote omitted). At least the first ground is satisfied here, because the TVA regularly exercises governmental functions, and immunity from suit for discretionary actions undertaken in that capacity arises from fundamental separation-of-powers principles.

The discretionary function exception is a crucial and longstanding form of immunity—recognized by this Court since at least *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 170-171 (1803)—that protects the government from "tort liability for errors * * * in the exercise of discretionary functions." *Dalehite* v. *United States*, 346 U.S. 15, 26-27 (1953); see *id.* at 34 & n.30 (citing, among others, *Marbury*, 5 U.S. (1 Cranch) at 170-171 ("Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation."). The exception's purpose is to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *United States* v. *S.A. Empresa de Viacao Rio Grandense (Varig*

Airlines), 467 U.S. 797, 814 (1984). "A contrary principle would indeed be pregnant with the greatest mischiefs." *Kendall* v. *Stokes*, 44 U.S. (3 How.) 87, 98 (1845).

Today, the discretionary function exception is applied most frequently under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, which codifies the exception by barring "[a]ny claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a). But the concept of immunity for "the discretion of the executive or the administrator to act according to one's judgment of the best course" long predates the FTCA and has a "substantial historical ancestry in American law." *Dalehite*, 346 U.S. at 34 & n.30; see *Kendall*, 44 U.S. (3. How.) at 98 ("[A] public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion; even although an individual may suffer by his mistake."); *Coates* v. *United States*, 181 F.2d 816, 818 (8th Cir. 1950) (citing cases from the 19th and early 20th centuries "in which the courts have had occasion to consider the meaning of 'discretionary functions' and to disclaim judicial power to interfere with, to enjoin or mandamus, or inquire into the wisdom or unwisdom or 'negligence' in their performance within the scope of authority lawfully granted").

Indeed, this Court explained in *Dalehite* that the discretionary function exception was included in the FTCA as a mere "clarifying amendment." 346 U.S. at 26. Congress "believed that claims of the kind embraced by the discretionary function exception [to the FTCA] would

have been exempted from the waiver of sovereign immunity by judicial construction." *Varig Airlines*, 467 U.S. at 810 (citing *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 29 (1942) (statement of Assistant Attorney General Francis M. Shea); *id.* at 37-46 (Memorandum with Appendixes, Federal Torts Claims Act—Explanatory of Comm. Print of H.R. 5373)). See also, *e.g.*, *Sea-Land Serv., Inc.* v. *United States*, 919 F.2d 888, 891 (3d Cir. 1990), cert. denied, 500 U.S. 941 (1991) (the discretionary function exception "merely makes explicit what would otherwise be implicit") (citing *Varig Airlines*, 467 U.S. at 810). The Eighth Circuit observed shortly after the FTCA was enacted that Congress had adopted the discretionary function exception "in recognition of the separation of powers among the three branches of the government and the considerations of public policy which have moved the courts to refuse to interfere with the actions of officials at all levels of the executive branch who, acting within the scope of their authority, were required to exercise discretion or judgment." *Coates*, 181 F.2d at 818.

Because the discretionary function rule is so venerable and so essential to the effectiveness of governmental activities, multiple courts have interpreted immunity waivers in other statutes besides the FTCA to include an implied discretionary function exception. For example, the Suits in Admiralty Act broadly waives the government's sovereign immunity in admiralty suits, and it contains no textual discretionary function exception. See 46 U.S.C. 30903(a). Yet every court of appeals to

have considered the question has recognized a discretionary function exception under the SIAA.[2]

ii. For the TVA, discretionary function immunity arises not from the FTCA but from an implied exception—based on constitutional separation-of-powers principles—to the waiver of sovereign immunity in the TVA's organic statute, the TVA Act. See *Burr*, 309 U.S. at 245. When Congress enacted the FTCA, it exempted the TVA, see 28 U.S.C. 2680(*l*), and instead left in place the scope of the TVA's existing liability to suit under the TVA Act (except in admiralty cases against the TVA where the SIAA's exclusive-remedy provision applies, as discussed below). See H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945) ("[T]he [FTCA] does not affect the existing liability of [the TVA] to be sued in tort.").

The discretionary function exception is properly implied under the TVA Act for the same reason that courts have implied such an exception under the SIAA and that Congress considered it a mere clarification to

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[2] See *Gercey* v. *United States*, 540 F.2d 536, 539 (1st Cir. 1976), cert. denied, 430 U.S. 954 (1977); *In re Joint E. & S. Dists. Asbestos Litig.*, 891 F.2d 31, 35 (2d Cir. 1989); *Sea-Land Service*, 919 F.2d at 891 (3d Cir.); *McMellon* v. *United States*, 387 F.3d 329, 338 (4th Cir. 2004) (en banc), cert. denied, 544 U.S. 974 (2005); *Wiggins* v. *United States*, 799 F.2d 962, 966 (5th Cir. 1986); *Baldassaro* v. *United States*, 64 F.3d 206, 208 (5th Cir. 1995), cert. denied, 517 U.S. 1207 (1996); *Graves* v. *United States*, 872 F.2d 133, 137 (6th Cir. 1989); *Bearce* v. *United States*, 614 F.2d 556, 559-560 (7th Cir.), cert. denied, 449 U.S. 837 (1980); *Earles* v. *United States*, 935 F.2d 1028, 1031-1032 (9th Cir. 1991); *Tew* v. *United States*, 86 F.3d 1003, 1005 (10th Cir. 1996); *Drake Towing Co.* v. *Meisner Marine Constr. Co.*, 765 F.2d 1060, 1063-1064 (11th Cir. 1985), abrogated on other grounds by *Cranford* v. *United States*, 466 F.3d 955, 959 (11th Cir. 2006), cert. denied, 552 U.S. 810 (2007); *Canadian Transp. Co.* v. *United States*, 663 F.2d 1081, 1085-1086 (D.C. Cir. 1980).

the immunity waiver in the FTCA: absent the exception, "all administrative and legislative decisions concerning the public interest" would be subjected "to independent judicial review in the not unlikely event that the implementation of those policy judgments were to cause private injuries." *In re Joint E. & S. Dists. Asbestos Litig.*, 891 F.2d 31, 35 (2d Cir. 1989) (discussing the SIAA) (citations omitted). "Such an outcome is intolerable under our constitutional system of separation of powers." *Ibid.*

The TVA is "an agency of the Federal Government," *Ashwander* v. *TVA*, 297 U.S. 288, 315 (1936), and "a wholly owned public corporation of the United States," *TVA* v. *Hill*, 437 U.S. 153, 157 (1978), charged with pursuing defined public purposes, 16 U.S.C. 831. The TVA is vested with the eminent domain power, 16 U.S.C. 831c(h), and law enforcement authority, 16 U.S.C. 831c-3(a) and (b). In exercising those responsibilities, the TVA undertakes many activities that are not materially distinguishable from those of other agencies, including activities protected by the discretionary function exception. For example, judgments regarding the control of the water level in a reservoir implicate the purposes of the discretionary function exception equally whether they are made by officials of the TVA or the Army Corps of Engineers. And likewise, judgments about the best way to warn boaters of an emergency in the water implicate government authority whether made by the TVA or the Coast Guard.

iii. Petitioners mistakenly seek to analogize this case to *Meyer*, in which this Court rejected a request "to engraft a portion of the [FTCA]"—its limitation of liability to "'circumstances where the United States, if a private person, would be liable to the claimant'"—"onto the

[FDIC's] sue-and-be-sued clause." 510 U.S. at 480 (citation omitted). The issue here is not whether the courts should "import" the discretionary function exception from the FTCA. The issue is whether the same separation-of-powers principles that prompted codification of the exception in the FTCA warrant reading the TVA Act to preserve immunity in similar circumstances, in much the same way that courts have construed the immunity waiver in the SIAA. Moreover, this case implicates a particular kind of governmental activity—emergency response—that *Meyer* did not. Nothing in the FTCA or the TVA Act suggests that the TVA was uniquely outside Congress's expectation that such discretionary functions "would [be] exempted from the waiver of sovereign immunity by judicial construction." *Varig Airlines*, 467 U.S. at 810. Congress exempted the TVA from the FTCA because it wished to maintain the scope of the TVA's existing tort liability under the TVA Act, not because it wished to abrogate the TVA's immunity for discretionary functions.

Petitioners also err in urging (Pet. 7-8) that the TVA's corporate status militates against implying a discretionary function exception. The FTCA extended the discretionary function exception to "corporations primarily acting as instrumentalities or agencies of the United States," 28 U.S.C. 2671; see 28 U.S.C. 2680(a), which suggests that such government-owned corporations would also have been immune by judicial construction prior to the FTCA. The SIAA similarly extends to "federally-owned corporation[s]," 46 U.S.C. 30903, and as mentioned above, the courts of appeals uniformly interpret the immunity waiver in that statute to include the discretionary function exception. The TVA is not

like other corporations because it performs governmental functions that other market participants do not—including engaging emergency response protocols, as happened in this case.

b. Petitioners assert (Pet. 14-15) that the court of appeals' decision in this case conflicts with two decisions from the Second and Fourth Circuits, but those decisions do not squarely address the questions presented here. In *North Carolina* v. *TVA*, 515 F.3d 344, 347 (4th Cir. 2008), the State of North Carolina alleged that the TVA's operation of coal power plants, pursuant to its authority to produce and sell electric power, 16 U.S.C. 831d(*l*), produced harmful pollution and constituted a common-law nuisance. The Fourth Circuit held that the TVA was not entitled to assert discretionary function immunity in that case, reasoning that those "power-generating activities are commercial in nature and thus are not immune to suit." 515 F.3d at 350 n.4. The court expressly reserved the question, however, whether the TVA could assert immunity "when it engages in a governmental function." *Ibid.* In this case, by contrast, the Eleventh Circuit held that the "TVA's challenged actions occurred in the context of its performance of a governmental function"—the exercise of its statutory authority to construct and repair electric power infrastructure—and that the TVA "acts as an agency of the United States when" doing so. Pet. App. 4a-5a.

The Second Circuit's decision in *Connecticut* v. *American Electric Power Co.*, 582 F.3d 309 (2009), rev'd on other grounds, 564 U.S. 410 (2011), similarly involved a suit by several States alleging a public nuisance based on emissions from coal power plants, including TVA plants. The Second Circuit held that the TVA could not assert discretionary function immunity, citing *Cooper*

and its conclusion that the "TVA had not established that its production of electricity by operating coal-burning power plants was a 'governmental function.'" *Id.* at 391. The Second Circuit did not address whether the TVA activities at issue here constitute a governmental function, and if so whether they would entitle the TVA to assert discretionary function immunity.

In short, *Cooper* and *Connecticut* involved different theories of liability lodged against different activities of the TVA. Those circuits' cramped understanding of the difference between commercial and governmental activities is contrary to this Court's precedents, which have rejected efforts to "push the courts into the 'non-governmental'–'governmental' quagmire that has long plagued the law of municipal corporations." *Indian Towing Co.* v. *United States*, 350 U.S. 61, 65 (1955); see *Varig Airlines*, 467 U.S. at 812. But that issue is separate from the question presented here. It is also not sufficiently important to warrant this Court's review given that the Second and Fourth Circuits do not commonly hear claims against the TVA. Petitioners have identified no case holding that the TVA would be categorically prohibited from asserting discretionary function immunity in a case, like this one, implicating the TVA's initiation of safety protocols in response to an emergency in the water.

c. In any event, it is not necessary for this Court to decide the scope of immunity under the TVA Act in this case, because the TVA is immune from this suit under the Suits in Admiralty Act.[3]

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[3] The TVA did not invoke the SIAA in the district court because, pursuant to Eleventh Circuit precedent, the TVA had a valid immunity defense through the TVA Act and the discretionary function exception, and because Eleventh Circuit precedent established that

The SIAA waives sovereign immunity to suits in admiralty against the United States "or a federally-owned corporation" where such an action could be maintained if a private person or property were involved. 46 U.S.C. 30903(a). Crucially, where the SIAA applies, an action under it is "exclusive of any other action * * * against * * * the United States or the federally-owned corporation." 46 U.S.C. 30904. That exclusive remedy-provision governs petitioners' suit.

The SIAA's definition of a covered "federally-owned corporation" is "a corporation in which the United States owns all the outstanding capital stock." 46 U.S.C. 30902. The TVA satisfies that definition because it is "a wholly owned public corporation of the United States." *Hill*, 437 U.S. at 157.

Moreover, this suit arises in admiralty within the meaning of the SIAA because the two requirements "of location and of connection with maritime activity" are satisfied. *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995). The location requirement is satisfied if "the tort occurred on navigable water," *ibid.*, and here the accident occurred on the navigable waters of the Tennessee River. The connection requirement "raises two issues." *Ibid.* First, a court "must 'assess the general features of the type of incident involved,' to determine whether the incident has 'a potentially disruptive impact on maritime commerce.'" *Ibid.* (quoting *Sisson* v. *Ruby*, 497 U.S. 358, 363, 364 n.2 (1990)). Here, a collision between a vessel and infrastructure spanning a navigable body of water plainly has the potential to disrupt maritime commerce—

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a motion to dismiss based on such immunity should be brought under Rule 12(b)(1). The TVA would assert SIAA immunity in a Rule 12(b)(6) motion or in its answer.

indeed, the Coast Guard responded by temporarily closing the Tennessee River to maritime commerce. "Second, a court must determine whether 'the general character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.'" *Ibid.* (quoting *Sisson*, 497 U.S. at 365, 364 & n. 2) (citations omitted). This test requires only that "one of the arguably proximate causes of the incident originated in the maritime activity of a tortfeasor." *Id.* at 541. Here, one of the alleged proximate causes of the incident is the TVA's alleged negligence in operating patrol boats on the river and in warning river traffic of a hazard to navigation. That activity has a substantial relationship to traditional maritime activity. And even if that were not enough, the construction and repair of infrastructure spanning navigable waters, like the power line at issue here, also has a substantial relationship to traditional maritime activity. See, *e.g.*, *Good* v. *Ohio Edison Co.*, 149 F.3d 413, 416 (6th Cir. 1998) (exercising admiralty jurisdiction where "a pleasure craft traveling through Sandusky Bay collided with the concrete and steel platform base of a transmission tower owned by Ohio Edison"); *Grab* v. *Traylor Bros.*, No. 09-3439, 2011 WL 1703181, at *3 (E.D. La. May 4, 2011) ("The activity of ensuring compliance with laws regarding maritime safety during the building of a bridge over navigable water has a 'substantial relationship to traditional maritime activity.'").

Thus, although petitioners attempted to plead in their complaint that they are permitted a remedy by the TVA's sue-and-be-sued provision, because the SIAA applies, petitioners were required to proceed under that statute—including the limitations on the SIAA's remedy—or not to proceed at all. And as mentioned,

every court of appeals to consider the question has held that the SIAA's waiver of immunity contains an exception for discretionary functions. See pp. 11-12 & n.2, *supra*. It is therefore unnecessary to decide in this case whether the TVA Act's sued-and-be-sued provision abrogates immunity for the TVA's discretionary functions.

2. Petitioners also argue (Pet. 21-26) that, assuming discretionary function immunity is sometimes available to the TVA, the court of appeals erred in holding that immunity applied to the specific activities alleged in this case—the TVA's choice of measures to warn vessels of the hazard in the water, the time and manner in which the TVA installed and then raised the downed conductor, and the TVA's qualification, training, and instruction of its employees in relation to those activities. Petitioners do not dispute that the court applied the correct test set out in *United States* v. *Gaubert*, 499 U.S. 315, 324-325 (1991), and *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988). They simply take issue with the application of that test to the facts of this case. That fact-bound question does not warrant this Court's review.

Petitioners do not argue that any other court of appeals has rejected discretionary function immunity in analogous circumstances. On the contrary, other courts have applied immunity to bar suits raising similar allegations. For example, in *Edwards* v. *TVA*, 255 F.3d 318 (6th Cir. 2001), after the plaintiff's son slipped on a rocky shoreline and drowned near a TVA dam on the Tennessee River, the court of appeals held that the discretionary function exception barred the plaintiff's suit alleging that the TVA had failed to maintain adequate safety measures to protect the public. See *id.* at 320-325.

The decision below applying immunity is correct. Under *Gaubert*, the discretionary function exception

applies if (1) "the challenged conduct involves an element of judgment" and (2) "that judgment is of the kind that the discretionary function exception was designed to shield," especially to "prevent judicial 'second-guessing' of * * * administrative decisions grounded in social, economic, and political policy." 499 U.S. at 322-323 (citations omitted).[4] Petitioners do not dispute that the first element is satisfied here, see Pet. 21-22, but they contend that the second is not satisfied because the challenged conduct is "garden-variety safety work," "nuts-and-bolts, on-the-ground, mostly physical work of safely raising a power line," and "wholly functional work." Pet. 22-24.

Petitioners' contention lacks merit. The TVA's decisions regarding how to warn river traffic of the hazard, and its decisions regarding when and how to raise the downed power line, both involved balancing multiple policy considerations, including the expected location, volume, and nature of river traffic at the times the TVA might raise the conductor; the cost and inconvenience to the public of closing the river or portions of it; the likelihood that vessels would ignore broadcast notices and other warnings of the potential hazard; and the importance to the power grid of promptly restoring the downed conductor's transmission capacity. Such decisions fall well within the scope of the discretionary function exception. See *Dalehite*, 346 U.S. at 23 (the discretionary function exception applied where "[t]he negligence charged was that the United States * * * shipped or permitted shipment [of highly explosive fertilizer] to a congested area without warning of the possibility of explosion under certain conditions"); *Edwards*, 255 F.3d

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[4] That same test applies in SIAA cases. See, *e.g.*, *McMellon*, 387 F.3d at 349.

at 325 ("courts have ruled that where a federal agency . . . must balance competing needs when deciding how to run a federal facility, the discretionary function exception * * * has been held to apply") (citation omitted).

Petitioners' allegation that the TVA was negligent in hiring and training its employees fares no better. Courts have repeatedly held that the discretionary function exception precludes tort claims based on the government's alleged negligent hiring, retention, training, and assignment of individuals to perform government work, absent an unambiguous requirement like a mandatory certification. See, *e.g.*, *Santana-Rosa* v. *United States*, 335 F.3d 39, 43-44 (1st Cir. 2003) ("Turning to the second segment of the *Gaubert* inquiry, the court must also conclude that decisions regarding * * * work assignments are susceptible to policy-related analysis."); *LeRose* v. *United States*, 285 Fed. Appx. 93, 97 (4th Cir. 2008) ("[D]ecisions regarding the hiring, supervision and retention of [government employees] are precisely the type of decisions that are protected under the discretionary function exception."), cert. denied, 555 U.S. 1170 (2009); *Snyder* v. *United States*, 590 Fed. Appx. 505, 509-510 (6th Cir. 2014) ("This Circuit has consistently held that agency supervisory and hiring decisions fall within the discretionary function exception. * * * This conclusion is consistent with the precedent of our sister Circuits."); *Dovenberg* v. *United States*, 407 Fed. Appx. 149, 149 (9th Cir. 2010) ("Decisions regarding the training and supervision of government employees 'fall squarely within the discretionary function exception'") (citation omitted); *Burkhart* v. *Washington Metro. Area Transit Auth.*, 112 F.3d 1207, 1217 (D.C. Cir. 1997) ("The hiring, training, and supervision choices

that WMATA faces are choices 'susceptible to policy judgment.'").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

SHERRY A. QUIRK
General Counsel
DAVID D. AYLIFFE
Associate General Counsel
JAMES S. CHASE
Senior Attorney
Tennessee Valley Authority

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17-1201

In The
Supreme Court of the United States

GARY THACKER,
VENIDA L. THACKER,

Petitioners,

v.

TENNESSEE VALLEY AUTHORITY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

Franklin T. Rouse
Counsel of Record
Kenneth B. Cole, Jr.
Gary V. Conchin
CONCHIN CLOUD & COLE, LLC
2404 Commerce Court, S.W.
Huntsville, Alabama 35801
(256) 705-7777
taylor@conchincloudcole.com

Counsel for Petitioners ***Dated: July 13, 2018***

THE LEX GROUP[DC] ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

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ARGUMENT

1. Engrafting a Discretionary-Function Exception Onto the TVA's Suability Clause Would Thwart Statutes and Thus Abrade the Separation of Powers

The TVA argues that tacking a discretionary-function exception onto the TVA's sue-and-be-sued statute upholds the separation of powers. The TVA contends: "For the TVA, discretionary[-]function immunity arises not from the FTCA but from an implied exception — based on constitutional separation-of-powers principles — to the waiver of sovereign immunity in the TVA's organic statute . . ."[1]

But the TVA gets things backward. It is adding a discretionary-function exception to the TVA's sue-and-be-sued clause that would contravene the statutory framework, thwart Congressional intent and enactment, and thus erode the separation of powers. (The TVA also rewrites this Court's longstanding precedent defining how immunity is tested for such entities. *Infra*, Part 2.)

The TVA brushes aside several statutes. The core statute — the TVA's sue-and-be-sued clause (16 U.S.C. § 831c(b)) — contains no discretionary-function exception. By statutory directive, that clause is restricted only by other parts of the Tennessee

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[1] Cert. Opp. 12.

Valley Authority Act.[2] None applies here. None appends a discretionary-function test to the sue-and-be-sued clause. The FTCA — from which the Eleventh Circuit has borrowed the discretionary-function exception[3] — excludes the TVA from its compass.[4] More generally, the FTCA aims at *waiving* immunity for the sort of garden-variety personal-injury claims raised here.

This Court has said that, "when Congress establishes" a sue-and-be-sued entity, "*it cannot lightly be assumed that restrictions on that authority are to be implied.*" *Fed. Housing Admin. v. Burr*, 309 U.S. 242, 245 (1940) (emphasis added). Absent a "clear" showing under *Burr*, "agencies 'authorized to "sue and be sued" are *presumed to have fully waived immunity.*'" *FDIC v. Meyer*, 510 U.S. 471, 481 (1994) (quoting *Int'l Primate Protection League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 86 (1991)) (emphasis added).

This consequently is not (as the TVA would have it) a case of keeping the judiciary from interfering with the executive. It is rather a case of the TVA's asking this Court to override Congress — to reshape the character that Congress gave the "broad[ly]" suable TVA. Due regard for the separation of powers lies in upholding the statutes by which

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[2] 16 U.S.C. § 831c(b) (Pet. App. 18a) ("Except as otherwise specifically provided *in this chapter* [the TVA Act], the [TVA] . . . [m]ay sue and be sued in its corporate name.") (emphasis added).

[3] Pet. App. 6a.

[4] 26 U.S.C. § 2068(l).

Congress formed the TVA as a sue-and-be-sued entity.

Furthermore, the TVA is *not* a full-blown executive "agency" like the FBI or IRS. The TVA is "a corporate entity, separate and distinct from the Federal Government itself."[5] The TVA "operates in much the same way as an ordinary business corporation, under the control of its directors in Tennessee, and not under that of a cabinet officer or independent agency headquartered in Washington." *Nat'l Resources Defense Council, Inc. v. TVA*, 459 F.2d 255, 257 (2d Cir. 1972). When it created the TVA, Congress "intend[ed] that" it would "have much of the essential freedom and elasticity of a private business corporation." *N.C. ex rel. Cooper v. TVA*, 515 F.3d 344, 349 (4th Cir. 2008) (quoting H.R. Rep. No. 73-130 at 19 (1933)).

The Fourth Circuit has thus held that suits against the TVA do not raise separation-of-powers concerns. *Id.* at 348–49. That court has pointed to numerous ways in which Congress has separated the TVA from the government. For example, Congress has

> exempted the TVA from the civil service laws, 16 U.S.C. § 831b; exempted the TVA from the purchasing requirements otherwise applicable to federal entities, 16 U.S.C. § 831h(b); and provided the TVA with authority to issue bonds which are not obligations of the United States, 16 U.S.C. § 831n-4(b). Moreover, the

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[5] *See Pierce v. United States*, 314 U.S. 306, 310 (1941).

> TVA funds its power-generating programs itself rather than with congressional appropriations. 16 U.S.C. § 831n-4.

Id. at 349. "This degree of independence which the TVA possesses in large part alleviates" separation-of-powers concerns. *Id.* "A lawsuit against the TVA

> is not a suit against the United States itself *or one of its agencies subject to the direct executive control which is granted to the President by Article II of the Constitution*. Rather, a suit against the TVA is against "a governmental agency in[] the commercial world," [*Loeffler v. Frank*, 486 U.S. 549, 555 (1994)] . . . Because *the TVA is so far removed from the control of the Executive Branch*, operating as the functional equivalent of a private corporation, the judiciary does not run the same risk of overstepping its bounds and "prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions," [*McMellon v. United States*, 387 F.3d 329, 341 (4th Cir. 2004) (*en banc*)] . . .

Id. at 349 (emphases added).

2. The TVA Mishandles *Burr*

This Court has explained — since 1940 — how to analyze sue-and-be-sued immunity. "[W]aivers by Congress of governmental immunity . . . should be

liberally construed," the Court has said, "notwithstanding the general rule that waivers of sovereign immunity are to be read narrowly in favor of the sovereign."[6] To impliedly reduce a "sue and be sued" clause's waiver of immunity, "it must be clearly shown" that one of *Burr's* three criteria is satisfied.[7] Absent that showing, sue-and-be-sued entities "are presumed to have fully waived immunity.'"[8]

Against this, the TVA simply insists on the Eleventh Circuit's analytical approach. Which is to say, the TVA forces discretionary-function cases to the front of the analysis, while relegating sue-and-be-sued doctrine (under *Burr*) by silent fiat to a vague, subordinate role as somehow "consistent with" *United States v. Smith*, 499 U.S. 160 (1991).[9]

This is question-begging. The TVA assumes (or asserts) what it is supposed to be proving. Exactly what is in question is whether a discretionary-function exception (obliquely referenced in *Smith* and tested under *Gaubert*[10]) displaces the long-governing sue-and-be-sued framework of *Burr*.

The TVA leans heavily on *Smith's* reference to "exceptions" to TVA suability.[11] But that reference is dicta. It is ancillary to *Smith's* discussion under the Federal Employees Liability Reform and Tort

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[6] *Burr*, 309 U.S. at 245; *Meyer*, 510 U.S. at 480. (emphasis added)
[7] *Burr*, 309 U.S. at 245.
[8] *Meyer*, 510 U.S. at 481 (quoting *International Primate*, 500 U.S. at 86).
[9] *See* Cert. Opp. 8.
[10] *United States v. Gaubert*, 499 U.S. 315 (1991).
[11] *See* Cert. Opp. 5, 8.

Compensation Act of 1988.[12] The two cases that *Smith* cites do not help the TVA. *Meredith* was decided before *Loeffler* and *Meyer* reaffirmed *Burr*; and *Burr* was not raised.[13] The defamation case of *Queen* turned, not on discretionary-function immunity, but on absolute immunity for good-faith speech.[14]

* * *

The TVA contends that, at all lengths, "the first ground [of the *Burr* test] is satisfied here, because the TVA regularly exercises governmental functions."[15]

Burr's first prong says that sue-and-be-sued entities may be immune from suit if it is "clearly shown" that the given "type[] of suit[]" is "not consistent with the statutory or constitutional scheme."[16]

This again begs the question. The TVA argues that "governmental functions" satisfy this head because "immunity . . . for discretionary actions . . . arises from fundamental separation-of-powers principles."[17] But whether a discretionary-function test applies to the TVA at all is exactly what is in issue.

Put differently, the TVA is here secreting a discretionary-function exception into the *Burr* sue-

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[12] *See Smith*, 499 U.S. at 168–69.
[13] *Peoples Nat. Bank of Huntsville, Ala. v. Meredith*, 812 F.2d 682 (11th Cir. 1987).
[14] *Queen* v. *TVA*, 689 F.2d 80, 85 (6th Cir. 1982).
[15] *Id.* at 9.
[16] *Burr*, 309 U.S. at 245.
[17] Cert. Opp. 9.

and-be-sued test. This is no different from the "engraft[ed]" discretionary-function test that this Court rejected in *Meyer*.

Furthermore, if "governmental functions" and "discretionary actions" are immune because they meet *Burr's* first prong, then *Burr's* second prong is obviated. The second head of *Burr* already contemplates immunity for "governmental functions." Specifically, under its second head, *Burr* permits an "implied" immunity to arise if it is "clearly shown" that an "implied restriction of the general authority [to sue and be sued] is *necessary* to avoid *grave interference* with . . . a governmental function."[18] If discretionary, "governmental functions" are immune under *Burr's first* head, though, then this second prong is made superfluous. Worse, the TVA's position erases *Burr's* further requirements that implied immunity be proven (1) "necessary" to (2) avoid "grave interference" with a "governmental function."

3. Circuit Split

The TVA denies that the conflict between how the Sixth and Eleventh Circuits have (incorrectly) analyzed its immunity, and how the Second and Fourth Circuit have done so, "warrants this Court's review."[19] The latter circuits supposedly "do not commonly hear claims against the TVA."[20] The TVA thus advocates different rules for people living in different federal circuits. That is facially unpersuasive. Moreover, the TVA claims that the

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[18] *Burr*, 309 U.S. at 245 (emphases added).
[19] Cert. Opp. 7.
[20] *Id.* at 16.

Sixth and Eleventh Circuits "encompass the vast majority of the Tennessee Valley region."[21] The TVA thus argues for a rule in those circuits that not only departs from this Court's precedent, but — as evidenced by this case — would, in all but the most marginal suits, leave the "vast majority" of its customers without normal tort remedies.

The TVA also complains that the Second and Fourth Circuits' "cramped understanding" of this Court's precedent would "push the courts" into the "quagmire" of distinguishing "governmental" from "non-governmental" functions.[22] Yet the *TVA's* discretionary-function test would ask the courts to divide the "governmental" and "discretionary" from the "non-governmental." The wholly different schema of *Burr-Loeffler-Meyer* largely avoids that "quagmire."

Finally, the TVA distinguishes the most salient Second and Fourth Circuit cases (*American Electric* and *Cooper*) as having dealt with acts that were "considered 'commercial' rather than governmental."[23] But this observation cuts against the TVA. Both those cases were pollution-nuisance suits that challenged the TVA's general operation of coal-fired power plants.[24] That is higher-level, more "policy"-laden activity than the component work of installing power lines. Yet, if those higher-level

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[21] *Id.* at 8.

[22] *Id.* at 16.

[23] *See id.* at 7, 15–16 (discussing *Cooper*, *supra*, and *Conn. v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009)).

[24] *See American Electric*, 582 F.3d at 325; *Cooper*, 515 F.3d at 346.

decisions were "commercial" and not immune (because part of the TVA's essentially private power-generation business), then even more clearly non-discretionary and not immune is the on-the-ground labor that is challenged here. The TVA might equally argue that managing an entire company is "commercial" and hence not immune, but removing a tripping hazard from the floor of the company's break room is somehow "policy"-laden, discretionary, and immune.

4. The Plaintiffs' Claims Do Not Fall Under the Suits in Admiralty Act

4.1 The TVA Has No "Capital Stock"

The Suits in Admiralty Act (SIAA)[25] waives maritime immunity only for corporations in which the government owns "*all the outstanding capital stock*."[26] The TVA has no "capital stock." The word "stock" is not found in the TVA Act, nor does that Act authorize the sale of any part of the TVA. The TVA "is not a corporation created under the general laws of some state or territory, whose stock the United States happen to own . . ."[27]

Congress could have subjected the TVA to suit under the SIAA, or made the SIAA applicable to government "corporations" without capital stock. It did not. The Thackers' claims thus do not fall under the SIAA, but under the TVA's sue-and-be-sued statute.

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[25] 46 U.S.C. §§ 30901–18.
[26] 46 U.S.C. §§ 30902–03 (emphasis added).
[27] *Posey v. TVA*, 93 F.2d 726, 727 (5th Cir. 1937).

4.2 The TVA Act "Repealed" Any Conflicting SIAA Immunity Exception

The SIAA was enacted in 1920.[28] Thirteen years later, Congress passed the TVA Act with its "broad," immunity-waiving sue-and-be-sued clause.[29] Nothing in the TVA Act restricts that waiver. Crucially, the TVA Act also provided: "[A]ll Acts or parts of Acts in conflict herewith are hereby repealed, so far as they affect the operations contemplated by this Act."[30] If the SIAA had a discretionary-function (or any other) exception that limited the TVA's sue-and-be-sued waiver, then the TVA Act "repealed" and negated that conflicting SIAA term.

4.3 Even if the SIAA Applied, It Would Not Immunize the TVA

The SIAA would not immunize the TVA from tort liability. The opposite is true. Congress and this Court have recognized that governmentally created corporations are broadly suable under the SIAA.

The SIAA was enacted to adjust the suability of the Emergency Fleet Corporation. The Corporation was created through the U.S. Shipping Board (itself a Congressionally formed entity) in the run-up to World War I.[31] The Corporation had outstanding stock and

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[28] Pub. L. No. 66-156, 41 Stat. 525–26 (1920) (current version at 46 U.S.C. § 30903).
[29] Pub. L. No. 73-17, 48 Stat. 58 (1933).
[30] *Id.*, ch. 32, § 28, 48 Stat. 71 (codified at 16 U.S.C. § 831aa).
[31] *See* 39 Stat. 728 (1916); *Sloan Shipyards Corp. v. U.S. Shipping Bd. Emer. Fleet Corp.*, 258 U.S. 549, 565 (1922).

contemplated that "private persons might be stockholders."[32] In the end, the federal government bought all the Corporation's stock.[33] When it passed the SIAA in 1920, Congress barred *in rem* but allowed *in personam* suits against corporations whose stock is wholly owned by the United States.[34] (Thus allowing maritime suits without the need or ability to attach United States-owned vessels.[35]) Congress provided no exception to the SIAA's immunity waiver.[36] No exception was added when Congress twice amended the SIAA[37] *after* the FTCA created the discretionary-function exception.[38] Nor has this Court created any SIAA exception.

This Court's precedent is to the contrary. Despite the "enormous powers"[39] given to the Emergency Fleet Corporation by statute and executive order, this Court declined to extend immunity to that entity. In *Sloan Shipyards, supra*, the Court said through Justice Holmes:

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[32] *Sloan Shipyards*, 258 U.S. at 565.

[33] *Id.*

[34] *See* Pub. L. No. 66-156, ch. 95, §§ 1–2, 41 Stat. 525–26 (1920) (codified as amended at 46 U.S.C. § 30908) (forbidding "arrest or seizure" of federally owned ships).

[35] *E. Transp. Co. v. United States*, 272 U.S. 675, 684 (1927) (no U.S.-vessel seizures given recognition of *in personam* claims).

[36] 41 Stat. 525 (1920).

[37] 74 Stat. 912 (1960) and 110 Stat. 3967 (2006).

[38] The same legislation that created the FTCA's discretionary-function exception expressly excluded SIAA claims and claims against the TVA. *See* Pub L. No. 79-601, ch. 753, § 421(d), (l), 60 Stat. 845–46 (1946).

[39] *Sloan Shipyards*, 258 U.S. at 566.

> [T]he general rule is that any person within the jurisdiction always is amenable to the law. If he is sued for conduct harmful to the plaintiff his only shield is a constitutional rule of law that exonerates him. . . . An instrumentality of government he might be and for the greatest ends, but the agent, because he is agent, *does not cease to be answerable for his acts*. . . .
>
> The meaning of incorporation is that you have a person, and as a person one that presumably is subject to the general rules of law. . . . *The plaintiffs are not suing the United States but the Fleet Corporation*, and if its act was unlawful, even if they might have sued the United States, they are not cut off from a remedy against the agent that did the wrongful act. . . .[40]

The Court reaffirmed this principle in *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575 (1943):

> [W]hen it comes to the utilization of corporate facilities in the broadening phases of federal activities in the commercial or business field, *immunity from suit is not favored*. Congress adopted that policy when it made corporations wholly owned by the United States suable on maritime causes of action under § 2 of the Suits in

[40] *Id.* at 566–68 (emphases added).

> Admiralty Act. That it had the power to grant or withhold immunity from suit on behalf of governmental corporations is plain. . . .[41]

Moreover, this Court rejected the "performance of a governmental function" as a defense under the SIAA in *Eastern Transportation, supra*.[42]

The TVA cites cases that (it says) have recognized a discretionary-function exception under the SIAA.[43] But every one of these cases involved a suit against the United States itself for the conduct of a true federal agency. Not one involved a sue-and-be-sued entity whose own enabling statute waived immunity.[44] The TVA's cases are thus inapposite.

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[41] *Brady*, 317 U.S. at 580 (citing *Sloan Shipyards* and *Burr*, among others) (emphasis added).

[42] *See* 272 U.S. at 682–83, 687–93.

[43] Cert. Opp. 11–12 n. 2.

[44] *McMellon v. United States*, 387 F.3d 329 (4th Cir. 2004) (Corps of Engineers); *Graves v. United States*, 872 F.2d 133 (6th Cir. 1989) (same); *Wiggins v. United States*, 799 F.2d 962 (5th Cir. 1986) (same); *Drake Towing Co. v. Meisner Marine Constr. Co.*, 765 F.2d 1060 (11th Cir. 1985) (same); *Tew v. United States*, 86 F.3d 1003 (10th Cir. 1996) (same; Coast Guard); *Canadian Transp. Co. v. United States*, 663 F.2d 1081 (D.C. Cir. 1980) (Coast Guard); *Bearce v. United States*, 614 F.2d 556 (7th Cir. 1980) (same); *Gercey v. United States*, 540 F.2d 536 (1st Cir. 1976) (same); *Cranford v. United States*, 466 F.3d 955 (11th Cir. 2006) (same); *Earles v. United States*, 935 F.2d 1028 (9th Cir. 1991) (Navy); *Baldassaro v. United States*, 64 F.3d 206 (5th Cir. 1995) (employment action against U.S.); *Sea-Land Serv. v. United States*, 919 F.2d 888 (3d Cir. 1990) (against U.S. for ships built with asbestos); *In re Joint E. & S. Dist. Asbestos Litig.*, 891 F.2d 31 (2d Cir. 1989) (same).

* * *

For the TVA's garden-variety malfeasance, the Eleventh Circuit has left the Thackers without a remedy. Even if the TVA is largely correct, it would still need this Court to harmonize the circuits, rewrite precedent, and clarify the new rules governing sue-and-be-sued immunity. Even if the TVA is mostly correct, the Court should still review this case.

CONCLUSION

The Court should grant this petition for a writ of certiorari.

Respectfully submitted,

Franklin T. Rouse
Counsel of Record
CONCHIN CLOUD & COLE, LLC
2404 Commerce Court, S.W.
Huntsville, Alabama 35801
(256) 705-7777
taylor@conchincloudcole.com

Counsel for Petitioners

No. 17-1201

In The Supreme Court of the United States

GARY THACKER and
VENIDA L. THACKER,
Petitioners,

v.

TENNESSEE VALLEY AUTHORITY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

Franklin Taylor Rouse
Counsel of Record
Craig N. Rosler
Kenneth Bridges Cole, Jr.
Gary Vestal Conchin
CONCHIN, CLOUD & COLE, LLC
2404 Commerce Court, S.W.
Huntsville, Alabama 35801
(256) 705-7777
taylor@conchincloudcole.com

Counsel for Petitioners

Noel J. Francisco
Solicitor General
Counsel of Record
DEPARTMENT OF JUSTICE
Washington, DC 20530
(202) 514-2217
SupremeCtBriefs@usdoj.gov

Counsel for Respondent

Dated: November 13, 2018

(Counsel Continued on Inside Cover)

Petition for Certiorari Filed February 26, 2018
Certiorari Granted September 27, 2018

No. 17-1201

Sherry A. Quirk
General Counsel
David D. Ayliffe
Associate General Counsel
James S. Chase
Senior Attorney
Tennessee Valley Authority
Knoxville, Tennessee 37902
(865) 632-8964

Counsel for Respondent

Petition for Certiorari Filed February 26, 2018
Certiorari Granted September 27, 2018

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Relevant Docket Entries from the United States District Court for the District of Alabama (Northeastern), No. 5:15-cv-01232-AKK JA13

Complaint
filed July 23, 2015 ..... JA22

Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction Based on the Discretionary Function Exception of the United States District Court for the Northern District of Alabama
filed March 8, 2016 ..... JA34

Defendant's Brief in Support of TVA's Motion to Dismiss for Lack of Subject Matter Jurisdiction Based on the Discretionary Function Exception of the United States District Court for the Northern District of Alabama
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Plaintiffs Gary and Venida Thacker's Response in Opposition to Tennessee Valley Authority's Motion to Dismiss for Lack of Subject Matter Jurisdiction of the United States District Court for the Northern District of Alabama filed March 29, 2016 ..... JA61

Reply Brief in Further Support of TVA's Motion to Dismiss for Lack of Subject Matter Jurisdiction Based on the Discretionary Function Exception of the United States District Court for the Northern District of Alabama filed April 1, 2016..... JA90

General Docket

United States Court of Appeals for the Eleventh Circuit

Court of Appeals Docket #: 16-15105	**Docketed:** 07/21/2016
Nature of Suit: 3360 Other Personal Injury	**Termed:** 08/22/2017
Gary Thacker, et al v. TVE	
Appeal From: Northern District of Alabama	**Case Handler:** Lewis, Carol R., CC
Fee Status: Fee Paid	(404) 335-6179

Case Type Information:

1) Private Civil

2) Federal Question

3) –

Originating Court Information:

District: 1126-5 : 5:15-cv-01232-AKK

Civil Proceeding: Abdul K. Kallon, U.S. District Judge

Date Filed: 07/23/2015

Date NOA Filed: 07/21/2016

Prior Cases:

None

Current Cases:

None

GARY THACKER

Plaintiff - Appellant

Kenneth Bridges Cole, Jr.
Direct: 256-705-7777
[COR LD NTC Retained]
Conchin Cloud & Cole, LLC
2404 COMMERCE CT
HUNTSVILLE, AL 35801

Franklin Taylor Rouse
Direct: 256-705-7777
[COR LD NTC Retained]
Conchin Cloud & Cole, LLC
2404 COMMERCE CT
HUNTSVILLE, AL 35801

Gary Vestal Conchin
Direct: 256-705-7777
[NTC Retained]
Conchin Cloud & Cole, LLC
2404 COMMERCE CT
HUNTSVILLE, AL 35801

VENIDA L. THACKER

Plaintiff - Appellant

Kenneth Bridges Cole, Jr.
Direct: 256-705-7777
[COR LD NTC Retained]
(see above)

Gary Vestal Conchin
Direct: 256-705-7777
[NTC Retained]
(see above)

Franklin Taylor Rouse
Direct: 256-705-7777
[NTC Retained]
(see above)

versus

TENNESSEE VALLEY AUTHORITY
Defendant - Appellee

James S. Chase
Direct: 865-632-4239
[COR LD NTC Retained]
Tennessee Valley Authority
Office of the General Counsel
WT 6A-K
400 W SUMMIT HILL DR
KNOXVILLE, TN 37902

Edwin Warren Small
Direct: 865-632-3021
[COR LD NTC U.S. Government]
Tennessee Valley Authority
Office of the General Counsel
400 W SUMMIT HILL DR
KNOXVILLE, TN 37902

David Demar Ayliffe
Direct: 865-632-8964
[COR NTC Retained]
Tennessee Valley Authority
Office of the General Counsel
WT6A-K
400 W SUMMIT HILL DR
KNOXVILLE, TN 37902

GARY THACKER, VENIDA L. THACKER, Plaintiffs - Appellants, versus TENNESSEE VALLEY AUTHORITY, Defendant - Appellee.

07/21/2016	CIVIL APPEAL DOCKETED. Notice of appeal filed by Appellants Gary Thacker and Venida L. Thacker on 07/21/2016. Fee Status: Fee Paid. No hearings to be transcribed. The appellant's brief is due on or before 08/30/2016. The appendix is due no later than 7 days from the filing of the appellant's brief. Awaiting Appellant's CIP Due on or before 08/12/2016 as to Appellant Gary Thacker [Entered: 07/29/2016 12:29 PM]
08/01/2016	APPEARANCE of Counsel Form filed by Edwin W. Small for TVE. (ECF: Edwin Small) [Entered: 08/01/2016 01:25 PM]
08/01/2016	Added Attorney Edwin Warren Small for Appellee TVE, in case 16-15105. [Entered: 08/01/2016 03:54 PM]
08/01/2016	E-filed Appearance of Counsel processed for Attorney Edwin Warren Small for Appellee TVE in 16-15105. [Entered: 08/01/2016 03:54 PM]

08/03/2016	APPEARANCE of Counsel Form filed by James S. Chase for TVA (ECF: James Chase) [Entered: 08/03/2016 03:43 PM]
08/03/2016	E-filed Appearance of Counsel processed for Attorney James S. Chase for Appellee TVE in 16-15105. [Entered: 08/03/2016 04:13 PM]
08/16/2016	Kenneth B. Cole, Jr., Gary Vestal Conchin, and Franklin Taylor Rouse for Appellants Gary Thacker and Venida L. Thacker have been notified that upon expiration of fourteen (14) days from this date, this appeal will be dismissed by the clerk without further notice unless the required Civil Appeal Statement has been received. A motion to file the Civil Appeal Statement out of time should also be filed at this time. [Entered: 08/16/2016 08:42 AM]
08/16/2016	NOTICE OF CIP FILING DEFICIENCY to Kenneth B. Cole, Jr., Gary Vestal Conchin, and Franklin Taylor Rouse for Gary Thacker and Venida L. Thacker. You are receiving this notice because you have not completed the Web-Based Stock Ticker Symbol CIP via the court's public web-page and have not filed the CIP via the electronic filing system (CM/ECF). Failure to comply with 11th Cir. Rules 26.1-1 through 26.1-4 may result in dismissal of the case or appeal under 11th Cir. R. 42-1(b), return of deficient

	documents without action, or other sanctions on counsel, the party, or both. [Entered: 08/16/2016 08:47 AM]
08/19/2016	APPEARANCE of Counsel Form filed by Kenneth Bridges Cole, Jr. for Gary Thacker and Venida L. Thacker. (ECF: Kenneth Cole) [Entered: 08/19/2016 03:11 PM]
08/19/2016	Certificate of Interested Persons and Corporate Disclosure Statement filed by Attorney Kenneth Bridges Cole, Jr. for Appellants Gary Thacker and Venida L. Thacker. On the same day the CIP is served, the party filing it must also complete the court's web-based stock ticker symbol certificate at the link here http://www.ca11.uscourts.gov/web-based-cip or on the court's website. See 11th Cir. R. 26.1-2(b). (ECF: Kenneth Cole) [Entered: 08/19/2016 03:12 PM]
08/19/2016	*TIME SENSITIVE MOTION for leave to file Motion to File Civil Appeal Statement Out of Time out of time filed by Gary Thacker and Venida L. Thacker. Opposition to Motion is Unknown. [7887693-1]* (ECF: Kenneth Cole) [Entered: 08/19/2016 03:30 PM]
08/19/2016	E-filed Appearance of Counsel processed for Attorney Kenneth Bridges Cole Jr. for Appellant Venida L. Thacker in 16-15105, Attorney Kenneth Bridges Cole Jr. for Appellant Gary Thacker in 16-15105. [Entered: 08/19/2016 04:28 PM]

08/30/2016	Appellant's brief filed by Gary Thacker and Venida L. Thacker. (ECF: Kenneth Cole) [Entered: 08/30/2016 11:58 AM]
08/30/2016	Appendix filed [1 VOLUMES] by Appellants Gary Thacker and Venida L. Thacker. (ECF: Kenneth Cole) [Entered: 08/30/2016 11:59 AM]
09/01/2016	Received paper copies of EBrief filed by Appellants Gary Thacker and Venida L. Thacker. [Entered: 09/02/2016 07:59 AM]
09/02/2016	Received paper copies of EAppendix filed by Appellants Gary Thacker and Venida L. Thacker. 1 VOLUMES - 4 SETS [Entered: 09/02/2016 08:01 AM]
09/06/2016	ORDER: The appellants' motion for leave to file the civil appeal statement form out of time is GRANTED. (CW) [7887693-2] [Entered: 09/06/2016 02:23 PM]
09/06/2016	Civil Appeal Statement filed by Attorney Kenneth Bridges Cole, Jr. for Appellants Gary Thacker and Venida L. Thacker. [Entered: 09/06/2016 02:27 PM]
09/09/2016	APPEARANCE of Counsel Form filed by David Demar Ayliffe for TVE. (ECF: David Ayliffe) [Entered: 09/09/2016 01:34 PM]
09/09/2016	E-filed Appearance of Counsel processed for Attorney David Demar Ayliffe for Appellee TVE in 16-15105. [Entered: 09/09/2016 05:29 PM]

09/29/2016	Appellee's Brief filed by Appellee TVE. (ECF: Edwin Small) [Entered: 09/29/2016 02:04 PM]
09/30/2016	Received paper copies of EBrief filed by Appellee TVE. [Entered: 10/03/2016 08:30 AM]
10/13/2016	Reply Brief filed by Appellants Gary Thacker and Venida L. Thacker. (ECF: Kenneth Cole) [Entered: 10/13/2016 01:35 PM]
10/14/2016	Received paper copies of EBrief filed by Appellants Gary Thacker and Venida L. Thacker. [Entered: 10/20/2016 11:43 AM]
02/03/2017	The Court has determined that oral argument will be necessary in this case. Please forward 3 additional copies of the 1 volumes of Appendix filed 8/30/16 by Attorney Kenneth Bridges Cole, Jr. for Appellants Gary Thacker and Venida L. Thacker to the Clerk's Office, Attention: Jenifer Tubbs. Your prompt attention to this matter is appreciated. [Entered: 02/03/2017 03:12 PM]
02/10/2017	Additional copies of Appendix (3 sets - 1 vol ea) received from Kenneth Bridges Cole, Jr. for Gary Thacker and Venida L. Thacker and Gary Vestal Conchin for Gary Thacker and Venida L. Thacker and forwarded to the record room. [Entered: 02/10/2017 03:29 PM]

02/15/2017	Assigned to tentative calendar number 18 in Montgomery during the week of April 24, 2017. Counsel must be logged into CM/ECF in order to view the attached calendar. [Entered: 02/15/2017 10:10 AM]
03/10/2017	Calendar issued as to cases to be orally argued the week of 04/24/2017 in Montgomery, Alabama. Counsel are directed to electronically acknowledge receipt of this calendar by docketing the Calendar Receipt Acknowledged event in ECF. Counsel must be logged into CM/ECF in order to view the attached calendar. [Entered: 03/10/2017 11:02 AM]
03/10/2017	Attorney Edwin Warren Small for Appellee TVE hereby acknowledges receipt of a copy of the printed calendar for 04/28/2017. Edwin W. Small 865-632-3021 will present argument. (ECF: Edwin Small) [Entered: 03/10/2017 02:39 PM]
03/10/2017	Oral argument scheduled. Argument Date: Friday, 04/28/2017 Argument Location: Montgomery, AL. [Entered: 03/10/2017 02:43 PM]
03/10/2017	*MOTION for appointment of counsel filed by Gary Thacker and Venida L. Thacker. Motion is Unopposed. [8067208-1]* (ECF: Kenneth Cole) [Entered: 03/10/2017 04:08 PM]

03/22/2017	Attorney Kenneth Bridges Cole, Jr. for Appellants Gary Thacker and Venida L. Thacker hereby acknowledges receipt of a copy of the printed calendar for 04/28/2017. Kenneth B. Cole, Jr. 256-705-7777 will present argument. (ECF: Kenneth Cole) [Entered: 03/22/2017 10:12 AM]
03/24/2017	ORDER: Motion to add Counsel Franklin Taylor Rouse as additional counsel for the Appellant is GRANTED. ENTERED FOR THE COURT - BY DIRECTION. [8067208-2] Attorney(s) Franklin Taylor Rouse for party(s) Appellant Gary Thacker, in case 16-15105. [Entered: 03/24/2017 03:48 PM]
04/28/2017	Oral argument held. Oral Argument participants were Kenneth Bridges Cole, Jr. for Appellants Gary Thacker and Venida L. Thacker and Edwin Warren Small for Appellee TVE. [Entered: 05/01/2017 10:33 AM]
08/22/2017	Opinion issued by court as to Appellants Gary Thacker and Venida L. Thacker. Decision: Affirmed. Opinion type: Published. Opinion method: Per Curiam. The opinion is also available through the Court's Opinions page at this link http://www.ca11.uscourts.gov/opinions. [Entered: 08/22/2017 09:03 AM]
08/22/2017	Judgment entered as to Appellants Gary Thacker and Venida L. Thacker. [Entered: 08/22/2017 09:05 AM]

09/12/2017	Petition for panel rehearing only filed by Appellants Gary Thacker and Venida L. Thacker. (ECF: Kenneth Cole) [Entered: 09/12/2017 01:32 PM]
09/15/2017	Received paper copies of E-PFR filed by Appellants Gary Thacker and Venida L. Thacker. [Entered: 09/19/2017 10:12 AM]
11/28/2017	ORDER: Petition for panel rehearing only filed by Appellants Gary Thacker and Venida L. Thacker is DENIED. [8308390-1] [Entered: 11/28/2017 10:16 AM]
12/06/2017	Mandate issued as to Appellants Gary Thacker and Venida L. Thacker. [Entered: 12/06/2017 01:02 PM]
02/28/2018	Notice of Writ of Certiorari filed as to Appellants Gary Thacker and Venida L. Thacker. SC# 17-1201. [Entered: 03/01/2018 02:58 PM]
04/11/2018	Checked status of ceritorari 17-1201 filed as to Appellants Gary Thacker and Venida L. Thacker - Pending. [Entered: 04/11/2018 04:00 PM]
05/14/2018	Checked status of ceritorari 17-1201 filed as to Appellants Gary Thacker and Venida L. Thacker - Pending. [Entered: 05/14/2018 04:11 PM]
06/21/2018	Checked status of ceritorari 17-1201 filed as to Appellants Gary Thacker and Venida L. Thacker - Pending. [Entered: 06/21/2018 10:52 AM]

07/24/2018	Checked status of ceritorari S Ct # 17-1201 filed as to Appellants Gary Thacker and Venida L. Thacker - Pending. [Entered: 07/24/2018 02:35 PM]
08/29/2018	Checked status of certiorari 17-1201 filed as to Appellants Gary Thacker and Venida L. Thacker - Pending. [Entered: 08/29/2018 11:52 AM]
09/27/2018	Writ of Certiorari filed as to Appellant Gary Thacker is GRANTED. SC# 17-1201. [Entered: 10/12/2018 11:38 AM]
10/01/2018	Checked status of certiorari S Ct # 17-1201 filed as to Appellant Gary Thacker - Pending. Cert was GRANTED on 9/28/18. AWaiting notice from USSC that cert has been granted. [Entered: 10/01/2018 03:25 PM]

U.S. District Court
Northern District of Alabama (Northeastern)
CIVIL DOCKET FOR CASE #:
5:15-cv-01232-AKK

Thacker et al v. Tennessee Valley Authority

Assigned to: Judge Abdul K Kallon

Case in other court: 11th Circuit Court of Appeals, 16-15105-CC

Cause: 28:1391 Personal Injury

Date Filed: 07/23/2015

Date Terminated: 05/23/2016

Jury Demand: Plaintiff

Nature of Suit: 360 P.I.: Other

Jurisdiction: Federal Question

Plaintiff

Gary Thacker

represented by **Gary V Conchin**
CONCHIN CLOUD & COLE LLC
2404 Commerce Court Suite B
Huntsville, AL 35801
256-705-7777
Fax: 256-705-7778
Email: gary@conchincloudcole.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Kenneth Bridges Cole , Jr
CONCHIN CLOUD COLE
2404 Commerce Court
Huntsville, AL 35801
256-384-7777
Fax: 256-384-7770

Email: kenny@conchincloudcole.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Franklin Taylor Rouse
CONCHIN CLOUD & CLOUD LLC
2404 Commerce Court
Huntsville, Al 35801
256–705–7777
Fax: 256–705–7778
Email: taylor@conchincloudcole.com
ATTORNEY TO BE NOTICED

Plaintiff

Venida L. Thacker

represented by **Gary V Conchin**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Kenneth Bridges Cole , Jr
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Franklin Taylor Rouse
(See above for address)
ATTORNEY TO BE NOTICED

V.

Defendant

Tennessee Valley Authority

represented by **David D Ayliffe**
TENNESSEE VALLEY
AUTHORITY
OFFICE OF THE GENERAL
COUNSEL

400 West Summit Hill Drive, Wt6
Knoxville, TN 37902–1401
865–632–8964
Fax: 865–632–6718
Email: ddayliffe@tva.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Edwin W Small
TENNESSEE VALLEY
AUTHORITY
OFFICE OF GENERAL COUNSEL
400 West Summit Hill Drive
Knoxville, TN 37902–1401
1–865–632–3021
Fax: 1–865–632–6718
Email: ewsmall@tva.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

James S Chase
TENNESSEE VALLEY
AUTHORITY
400 West Summit Hill Drive
Knoxville, TN 37902
865–632–4239
Fax: 865–632–3195
Email: jschase@tva.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
07/23/2015	1	COMPLAINT against Tennessee Valley Authority filed by Venida L. Thacker and Gary Thacker.(SPT) (Entered: 07/23/2015)

Date Filed	#	Docket Text
07/23/2015	2	Request for service by certified mail filed by Gary Thacker and Venida L. Thacker. (SPT) (Entered: 07/23/2015)
07/23/2015	3	NOTICE Regarding Consent to Magistrate Judge Jurisdiction. (SPT) (Entered: 07/23/2015)
07/24/2015		Filing Fee: Filing fee $ 400, receipt_number 1126–2439775 (B4601063945). related document 1 COMPLAINT against Tennessee Valley Authority filed by Venida L. Thacker and Gary Thacker.(SPT). (Cole, Kenneth) Modified on 7/27/2015 (SPT). (Entered: 07/24/2015)
08/10/2015	4	Summons Issued as to Tennessee Valley Authority by Clerk and delivered to Plaintiff for service. (SPT) (Entered: 08/10/2015)
08/20/2015	5	SUMMONS Returned Executed by Venida L. Thacker and Gary Thacker. Tennessee Valley Authority served on 8/13/2015, answer due 10/13/2015. (SPT) (Entered: 08/20/2015)
09/11/2015	6	MOTION to Consolidate Cases by Gary Thacker, Venida L. Thacker. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C)(Cole, Kenneth) (Entered: 09/11/2015)

Date Filed	#	Docket Text
09/25/2015	7	RETURN OF SERVICE by Gary Thacker, Venida L. Thacker re 6 MOTION to Consolidate Cases *was sent by certified mail and returned to Conchin, Cloud & Cole, LLC. on 9/24/2015* (Cole, Kenneth) (Entered: 09/25/2015)
10/05/2015	8	NOTICE of Appearance by Franklin Taylor Rouse on behalf of Gary Thacker, Venida L. Thacker (Rouse, Franklin) (Entered: 10/05/2015)
01/05/2016	9	Summons Issued as to the U.S. Attorney and U.S. Attorney General by Clerk and delivered to Plaintiff for service. (SPT) (Entered: 01/05/2016)
01/12/2016	10	SUMMONS Returned Executed by Venida L. Thacker, Gary Thacker. Tennessee Valley Authority served on 1/8/2016, answer due 3/8/2016. (Cole, Kenneth) (Entered: 01/12/2016)
03/08/2016	11	MOTION to Dismiss for Lack of Jurisdiction *Based on the Discretionary Function Exception* by Tennessee Valley Authority. (Chase, James) (Entered: 03/08/2016)
03/08/2016	12	Brief re 11 MOTION to Dismiss for Lack of Jurisdiction *Based on the Discretionary Function Exception* filed by Tennessee Valley Authority. (Attachments: # 1

Date Filed	#	Docket Text
		Affidavit Declaration of Chrisopher Shane Carman, # 2 Exhibit Unpubplished Opinion, Dickerson v. TVA)(Chase, James) (Entered: 03/08/2016)
03/10/2016	13	NOTICE OF REASSIGNMENT; the parties having not unanimously consented to the dispositive jurisdiction by a Magistrate Judge, the case has been randomly reassigned to Judge Abdul K Kallon. Magistrate Judge Harwell G Davis, III no longer assigned to the case. (SPT) (Entered: 03/10/2016)
03/15/2016	14	MOTION to Consolidate Cases by Gary Thacker, Venida L. Thacker. (Cole, Kenneth) (Entered: 03/15/2016)
03/18/2016	15	ORDER SETTING BRIEFING SCHEDULE re dft's 11 MOTION to Dismiss for Lack of Jurisdiction Based on the Discretionary Function Exception. Plff's response is due by 3/29/2016; dft's reply is due by 4/1/2016. Signed by Judge Abdul K Kallon on 3/18/2016. (YMB) (Entered: 03/18/2016)
03/22/2016	16	RESPONSE in Opposition re 14 MOTION to Consolidate Cases filed by Tennessee Valley Authority. (Attachments: # 1 Exhibit Sept. 30,

Date Filed	#	Docket Text
		2015 transmittal letter remanding case to state court)(Chase, James) (Entered: 03/22/2016)
03/29/2016	17	RESPONSE in Opposition to Dft's 11 MOTION to Dismiss for Lack of Subject Matter Jurisdiction, filed by Gary Thacker, Venida L. Thacker. (Cole, Kenneth) Modified on 3/29/2016 (YMB). (Entered: 03/29/2016)
04/01/2016	18	MOTION for Leave to File *Reply Brief in Excess of Page Limitations (Unopposed)* by Tennessee Valley Authority. (Chase, James) (Entered: 04/01/2016)
04/01/2016	19	REPLY Brief in Further Support of 11 MOTION to Dismiss for Lack of Jurisdiction Based on the Discretionary Function Exception, filed by Defendant Tennessee Valley Authority. (Chase, James) Modified on 4/1/2016 (YMB). (Entered: 04/01/2016)
05/23/2016	20	ORDER–The TVA's motion to dismiss 11 is GRANTED and this matter is DISMISSED without prejudice for lack of subject matter jurisdiction. Signed by Judge Abdul K Kallon on 5/23/2016. (AVC) (Entered: 05/23/2016)

Date Filed	#	Docket Text
05/23/2016	21	TEXT ORDER –In light of the court's denial of the motion to reconsider in *Brown v. Condux Tesmex, Inc., et al.*, No. 5:15–cv–1505–AKK, the motions to consolidate, docs. 6 , 14 , are MOOT. Signed by Judge Abdul K Kallon on 5/23/2016. (AVC) (Entered: 05/23/2016)
07/21/2016	22	NOTICE OF APPEAL as to 20 Order Dismissing Case by Gary Thacker, Venida L. Thacker. Filing fee $505.00, receipt number 1126–2667000 (NDAL credit card receipt no. B4601073092). (Conchin, Gary) Modified on 7/22/2016 (YMB). (Entered: 07/21/2016)
07/21/2016	23	NOTICE of Transmittal re 22 Notice of Appeal. (YMB) (Entered: 07/21/2016)
07/21/2016	24	Transmission of Docket Sheet, 20 Order Dismissing Case, 22 Notice of Appeal, and 23 Notice of Transmittal to US Court of Appeals. (YMB) (Entered: 07/21/2016)
07/29/2016	25	USCA Case Number 16–15105–CC for 22 Notice of Appeal filed by Gary Thacker, Venida L. Thacker. (YMB) (Entered: 07/29/2016)

Date Filed	#	Docket Text
10/04/2016		Pursuant to F.R.A.P. 11(c), the Clerk of the District Court for the Northern District of Alabama certifies that the record is complete for purposes of this appeal re: 22 Notice of Appeal, Appeal No. 16–15105–CC. The entire record on appeal is available electronically. (YMB) (Entered: 10/04/2016)
12/06/2017	26	MANDATE of USCA before Ed Carnes, Chief Judge, and Rosenbaum and Dubina, Circuit Judges; AFFIRMIND the decision of the District Court w/per curiam opinion attached; ISSUED AS MANDATE 12/6/2017. (Attachments: # 1 Exhibit USCA Opinion) (KBB) (Entered: 12/06/2017)

[ENTERED: July 23, 2015]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

GARY THACKER AND VENIDA L. THACKER,	)	
Plaintiffs,	)	
v.	)	**Civil Action No.: _____**
TENNESSEE VALLEY AUTHORITY,	)	
Defendant.	)	

COMPLAINT

Gary Thacker and Venida L. Thacker, Plaintiffs in the above-styled cause, complain of the Defendant as follows:

PARTIES

1. Plaintiff Gary Thacker is an adult resident citizen of Limestone County, Alabama.

2. Plaintiff Venida L. Thacker is an adult resident citizen of Limestone County, Alabama, and is the wife of Gary Thacker.

3. Defendant Tennessee Valley Authority (TVA) was created by the Tennessee Valley Authority Act of 1933, Pub. L. No. 73-17, 48 Stat. 58

(1933) (Preamble); 16 U.S.C. § 831. The purposes of the TVA Act were to improve navigability and to provide for flood control of the Tennessee River, reforestation and proper use of marginal lands in the Tennessee Valley, and agricultural and industrial development. The Act also empowered TVA to dispose of surplus power generated as incident to navigation and flood control. *See* 16 U.S.C. §§ 831(i); 831(h)(l). Congress "intend[ed] that [TVA] shall have much of the essential freedom and elasticity of a private business corporation." H.R. Rep. No. 130, 73d Cong., 1st Sess., at 19 (1933). TVA has used this flexibility and independence to become a substantial commercial enterprise. TVA is the largest public power company in the United States and operates one of the largest electric power systems in North America, supplying electric power to more than 8.6 million customers in parts of seven states. In 2005, TVA spent approximately $6.5 billion to operate its power system, which generated approximately $7.8 billion in annual revenues. These revenues are kept by the TVA to support its further corporate enterprises, and it is only required to pay a portion of its revenues to the United States Treasury. Thus, TVA is an independent corporation with nearly complete autonomy from direction and oversight of the U.S. government, and any judgment against it is not paid out of U.S. Treasury funds. For that reason Congress has specifically excepted TVA from the auspices of a suit against the United States, and the TVA may sue and be sued in its corporate name. *See* 16 U.S.C. § 83lc(b).

JURISDICTION AND VENUE

4. This Court has original jurisdiction over this action pursuant to Congressional waiver of suit against TVA under 16 U.S.C. § 831c(b).

5. Venue is proper in this district under 28 U.S.C. § 1391 because a substantial part of the events or omissions giving rise to this claim occurred in this district and division, specifically in Limestone County, Alabama.

FACTS

6. For many years, TVA had a uniformed patrol division commonly referred to as "the TVA Police." While the TVA Police existed, they patrolled boat traffic on the Tennessee River. This work patrolling boat traffic on the Tennessee River involved the use of official TVA Police boats equipped with blue strobe lights and sirens and public address units. In 2012, however, TVA made the decision to eliminate the TVA Police as part of a restructuring process. The planned and calculated dissolution of the TVA Police occurred at a time when the TVA Police had 61 uniformed officers. Rather than continue to employ these 61 uniformed officers and allow them to continue to patrol boat traffic on the Tennessee River with officially marked police boats equipped with blue strobe lights, sirens, and public address capability, the TVA chose to eliminate the entire TVA Police including all 61 of these officers. As a poor replacement for these 61 officers and their marked police boats, TVA made the decision to tum over some of their duties to contractors and/or use electronic surveillance, and to then depend on local law enforcement for the rest of

their duties. As one local law enforcement official said at the time TVA made this announcement in 2012, "This is a decision made by folks a long way from here that don't have any personal contact with the community. If you lived here, worked here, and cared for the area, you wouldn't do this." As of this time in 2012, therefore, TVA knew that it had substantially weakened its ability to properly and effectively patrol boat traffic on the Tennessee River. TVA also would have known that this weakened ability to patrol boat traffic on the Tennessee River could be an even more important factor in the event that an emergency situation of some kind was created on or around the Tennessee River. For that reason, TVA should have instituted heightened and stringent criteria for contractors to qualify to perform boat patrol activities and should have instituted and/or required training for contractors in the proper procedures to patrol boat traffic on the Tennessee River in the event of any emergency situation.

7. In early July of 2013, TVA began replacing old conductors on the Trinity-Browns Ferry 161 kV transmission lines that crossed the waters of the Tennessee River with new conductors. The work required use of a puller, a tensioner, and a pulling cable. As this work continued, TVA determined that a larger puller was needed. This new puller was procured on July 25, 2013. The new puller had a maximum working force of 40,000 pounds and a manually set safety limit of 22,000 pounds. The rated tensile strength of the pulling cable was greater than 50,000 pounds.

8. On July 30, 2013, TVA was replacing the last of three phase conductors on the Trinity-Browns Ferry 161 kV transmission line. TVA personnel were using the pulling cable to pull a running board that had the three phase conductors attached to the other side of the board across the river.

9. On information and belief, TVA had contracted with the owner/operator of two boat crews that were patrolling the Tennessee River while the overhead work was being performed. Neither boat was marked with any official TVA or government markings. Neither boat was equipped with blue lights, sirens, or public address capability. "Boat One" was designated with patrolling on the southern shore of the River to the River's midpoint; and "Boat Two" was designated with patrolling on the northern shore of the River to the River's midpoint. On information and belief, the only warning device associated with these two boats was one orange flag.

10. At approximately 2:40 p.m., the pulling cable failed, thereby allowing the new conductor to fall into the Tennessee River. This conductor stretched between the nearest two power line towers, with the central most part of the conductor partially looping down into the water. The area where the conductor contacted the water was in the channel used by most boat traffic.

11. TVA knew that the conductor looping down into the channel of the Tennessee River created a dangerous situation. TVA knew it did not have trained and experienced TVA Police to patrol the area. TVA knew that both commercial boat

traffic and recreational boat traffic would be traveling on the Tennessee River on a sunny July afternoon. TVA knew, or certainly should have known, that a recreational fishing tournament would begin approximately five miles to the east in approximately three hours. TVA knew it did not have enough patrol boats. TVA chose to not bring in additional patrol boats to monitor the situation and protect the public.

12. Instead, the TVA expanded the patrol area of Boat One and Boat Two in a misguided attempt to keep recreational boats from coming into contact with the downed line, requiring both crews to patrol the entire width of the River, with Boat One on the east side of the downed line, and Boat Two on the west side of the downed line. If anything, this decision by the TVA diluted the already inadequate ability of Boat One and Boat Two to patrol the channel where the conductor contacted the water.

13. TVA did not take any steps to mark the downed conductor and/or the area of the channel in which the conductor hung with any warning flags, markers, or buoys of any kind.

14. The Tennessee River is approximately 1.25 miles wide in the area where the downed conductor contacted the river. The channel is an area approximately 100 yards wide. The downed conductor was partially submerged in this channel.

15. Thus, while Boat One and Boat Two were charged with patrolling the entire width of the River, there was only a 100 yard wide area that needed to be patrolled. This area was where the

hazard existed and where most boat traffic could be expected.

16. Late that afternoon, a recreational fishing tournament began approximately five miles upstream on the Tennessee River to the east, launching out of Ingalls Harbor. This fishing tournament was held every Tuesday as a fun, recreational fishing activity. Gary Thacker participated in the tournament with his fishing partner Anthony J. Szozda, as they had done many times before, and the two launched from Ingalls Harbor at approximately 5:30 p.m. along with several other boats participating in the tournament.

17. Approximately 5 minutes after the tournament started, which was approximately three hours after the conductor fell into the water, Thacker and Szozda were traveling west on the Tennessee River on their way to one of their favorite fishing holes. They were never warned of the downed line, either before they launched their boat at Ingalls Harbor or after they were on the water. They were never stopped by Boat One or Boat Two; never saw any warning flags, buoys, or markers either on the line or in the water; and never saw Boat One or Boat Two in the channel where the conductor created the hazard to their lives and safety. In fact, Boat One and Boat Two were not even in the area.

18. The TVA workers were trying to raise the conductor at the same time Thacker and Szozda arrived in the area. The conductor was raised slightly just before they were about to go over it. Instead of being able to pass safely over it, therefore, the TVA conductor struck their boat, hit Szozda in

the neck, nearly decapitating him and killing him instantly, and striking Thacker in the head and torqueing his body about. Thacker suffered serious physical injuries that resulted in surgical intervention to repair damage to his spine.

19. Boat Two, which was on the far side of the conductor from Thacker's path of approach, arrived near Thacker after the fact of the collision with the conductor. Boat One, which was on the side of the conductor from which Thacker approached, failed to even attempt to stop Thacker's boat prior to the collision. The pilot of Boat Two, upon seeing the essentially decapitated Szozda in the boat, called 911. He then instructed Thacker to drive his boat back to Ingalls Harbor, approximately 5 miles away. Thacker made this entire drive with his essentially headless friend's body still in the boat with him.

20. Investigators inspected the area where the collision happened at approximately 7:45p.m., more than two hours after the fatal event and five hours after the conductor fell into the water. TVA had still failed to place any warning flags, emergency markings, or buoys on the downed conductor or in the water. Even after it knew of Szozda's death and Thacker's injuries, TVA did nothing to prevent any similar harm happening to anyone else.

21. TVA failed to properly qualify the contractors and/or employees that worked on this job; failed to properly plan for emergency situations like the situation that was created by its contractors and/or employees; failed to properly investigate the qualifications and/or training of its contractors

and/or employees; failed to properly train its contractors and/or employees; failed to properly instruct its contractors and/or employees in how to respond to the emergency and protect the public; and failed to properly supervise its contractors and/or employees in their response to the emergency and the inadequate steps taken to protect the public.

22. As a proximate result of TVA's conduct, Thacker has suffered severe personal injuries necessitating surgical intervention, reasonable and necessary medical bills, extreme emotional distress and mental anguish, and loss of enjoyment oflife in the past, and anticipates that he will continue to suffer from these injuries and conditions in the future and for the rest of his life.

23. As a proximate result of TVA's conduct, Venida L. Thacker has suffered loss of consortium damages because she has had to provide nursing services and care to her husband which otherwise would not have been necessary and because she and Mr. Thacker have not been able to have and enjoy the normal and healthy relationship they previously enjoyed as husband and wife, both because of the physical limitations that have plagued Mr. Thacker and because of the severe mental and emotional distress and anguish with which he now lives.

COUNT ONE

NEGLIGENCE

24. Plaintiffs adopt all preceding paragraphs and incorporate them by reference as if fully set forth herein.

25. TVA owed a duty to exercise reasonable care in the assembly and installation of the power lines across the Tennessee River. TVA also had a duty to exercise reasonable care in warning boaters on the Tennessee River of the hazards it created.

26. TVA breached the above duties.

27. TVA's negligence was a direct and proximate cause of Plaintiffs' injuries.

WHEREFORE, Plaintiffs request for a verdict against Defendant Tennessee Valley Authority in an amount sufficient to fairly and reasonably compensate them for the harm caused by the wrongful conduct of Tennessee Valley Authority.

COUNT TWO

WANTONNESS

28. Plaintiffs adopt all preceding paragraphs and incorporate them by reference as if fully set forth herein.

29. TVA owed a duty to exercise reasonable care in the assembly and installation of the power lines across the Tennessee River. TVA also had a duty to exercise reasonable care in warning boaters on the Tennessee River of the hazards it created.

30. TVA wantonly breached the above duties.

31. TVA's wantonness was a direct and proximate cause of Plaintiffs' injuries.

WHEREFORE, Plaintiffs request for a verdict against Defendant Tennessee Valley Authority in an amount sufficient to fairly and reasonably compensate them for the harm caused by the wrongful conduct of Tennessee Valley Authority and in an amount sufficient to preserve life, punish the defendants, protect the public, and prevent similar wrongs in the future.

Respectfully submitted on this 23rd day of July, 2015.

/s/ Gary V. Conchin
Gary V. Conchin
Attorney for Plaintiff

/s/ Kenneth B. Cole, Jr.
Kenneth B. Cole, Jr.
Attorney for Plaintiff

OF COUNSEL:

CONCHIN, CLOUD & COLE, LLC
2404 Commerce Court, S W
Huntsville, AL 35801
Phone: (256) 384-7777
Fax: (256) 384-7770
gary@conchincloudcole.com
kenny@conchincloudcole.com

JURY DEMAND

Plaintiffs demand a trial by struck jury.

/s/ Gary V. Conchin
Gary V. Conchin

/s/ Kenneth B. Cole, Jr.
Kenneth B. Cole, Jr.

SERVICE

Please serve Defendant via certified mail as follows:

Office of General Counsel
Sherry Quirk
Executive Vice President and General Counsel
Tennessee Valley Authority
400 W. Summit Hill Drive
Knoxville, TN 37902

[ENTERED: March 8, 2016]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

GARY THACKER, ET UX.,

Plaintiffs,

v. No. 5:15-cv-01232-HGD

TENNESSEE VALLEY AUTHORITY,

Defendant.

MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION BASED ON THE DISCRETIONARY FUNCTION EXCEPTION

Pursuant to Federal Rule of Civil Procedure 12(b)(1), Defendant Tennessee Valley Authority (TVA) moves the Court to dismiss this action for lack of subject matter jurisdiction based on the discretionary function exception.

Respectfully submitted,

s/James S. Chase
Edwin W. Small, Deputy General Counsel
James S. Chase, Senior Attorney
David D. Ayliffe, Senior Attorney
TVA GENERAL COUNSEL'S OFFICE
400 West Summit Hill Drive
Knoxville, Tennessee 37902-1401
Telephone 865.632.4239

Attorneys for Tennessee Valley Authority

CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically through the Court's ECF system on the date shown in the document's ECF footer. Notice of this filing will be sent by operation of the Court's ECF system to counsel for all other parties as indicated on the electronic filing receipt and listed below. Parties may access this filing through the Court's ECF system.

Gary V. Conchin, Esq.
Kenneth B. Cole, Esq.
Taylor Rouse, Esq.
Conchin, Cloud & Cole, LLC
2404 Commerce Court, SW
Huntsville, Alabama
Phone (256) 384-7777
gary@conchincloudcole.com
kenny@conchincloudcole.com
taylor@conchincloudcole.com

s/James S. Chase
Attorney for Tennessee Valley Authority

[ENTERED: March 8, 2016]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

GARY THACKER, ET UX.,

Plaintiffs,

v. No. 5:15-cv-01232-HGD

TENNESSEE VALLEY AUTHORITY,

Defendant.

BRIEF IN SUPPORT OF TVA'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION BASED ON THE DISCRETIONARY FUNCTION EXCEPTION

Edwin W. Small, Deputy General Counsel
James S. Chase, Senior Attorney
David D. Ayliffe, Senior Attorney
TVA GENERAL COUNSEL'S OFFICE
400 West Summit Hill Drive
Knoxville, Tennessee 37902-1401
Telephone 865.632.4239

Attorneys for Tennessee Valley Authority

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Pursuant to Federal Rule of Civil Procedure 12(b)(1), Defendant Tennessee Valley Authority (TVA) has moved the Court to dismiss this action for lack of subject matter jurisdiction based on the discretionary function exception. While TVA is generally subject to suit in tort under the TVA Act's sue-and-be-sued clause at 16 U.S.C. § 831c(b), discretionary functions are an exception to that waiver of sovereign immunity. As fully discussed below, the Court is without jurisdiction because the discretionary function exception applies to the alleged wrongful conduct of TVA in this case.

PERTINENT FACTS

The facts which are pertinent to the application of the discretionary function exception to this case are few and not subject to reasonable dispute.

On July 30, 2013, TVA was in the process of replacing an overhead conductor on the Government's Trinity-Browns Ferry 161-kV transmission line across the Wheeler Reservoir portion of the Tennessee River at river mile 297.5. (Compl., Doc. 1 ¶ 8.) The new overhead conductor was being pulled through pulleys near the tops of the transmission towers; because of the pulling tension on the conductor, it was far above the surface of the Reservoir. At approximately 2:40 p.m., the pulling cable failed, releasing the tension on the conductor and allowing the conductor to fall into the Tennessee River between the towers. (Compl., Doc. 1 ¶ 10.) TVA informed the United States Coast Guard of the situation at 3:10 p.m., and the Coast Guard established a Marine Safety Zone and closed the River to all vessels between Tennessee River miles 297-298. (Attach. 1, Carman Decl., ¶ 5.) Notice of the Marine Safety Zone and closure of the River was issued as a Coast Guard broadcast Notice to Mariners on marine radio channel VHF 16 at 3:40 p.m. and hourly thereafter in accordance with the regular schedule for Coast Guard broadcast Notices to Mariners.[1] (Attach. 1, Carman Decl., ¶ 5.) Once

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[1] The text of the Coast Guard's broadcast Notice to Mariners was:

> THE COTP [CAPTAIN OF THE PORT] OHIO VALLEY HAS ESTABLISHED A SAFETY ZONE FROM MM 297-298 TNR DUE TO

the Marine Safety Zone was established, it was a violation of Federal law for any vessel to navigate the River between river miles 297 and 298 without Coast Guard authorization. *See* 33 C.F.R. § 165.20 ("A Safety Zone is a water area . . . which, for safety . . . purposes, access is limited to authorized persons . . . or vessels."); 33 C.F.R. § 165.23 (prohibiting entry of a person or vessel into a Safety Zone).

At 5:30 p.m., a fishing tournament started at Ingalls Harbor, located approximately five miles upriver from the downed conductor. (Compl., Doc. 1 ¶ 16.) When the tournament started, Plaintiff Gary Thacker and a fishing partner proceeded downriver from Ingalls Harbor in Thacker's boat. (Compl., Doc. 1 ¶ 16.) Five minutes later they reached the location of the downed conductor (indicating they were traveling at an average boat speed of sixty miles per hour). (Compl., Doc. 1 ¶ 17.)

At the exact time that Plaintiff Thacker and his fishing partner reached the conductor location, the conductor was being pulled out of the water and back up to the pulleys at the tops of the transmission towers. (Compl., Doc. 1 ¶ 18.) Thus, "[i]nstead of being able to pass safely over" the conductor (Compl., Doc. 1 ¶ 18), Thacker's boat struck the conductor at a spot where the conductor was a short distance

---

> PARTED CABLES AND LOW HANGING CABLES. NO VESSELS MAY ENTER THIS AREA WITHOUT THE PERMISSION OF CG SOHV [COAST GUARD SECTOR OHIO VALLEY]. CG SECTOR OHIO VALLEY IS STANDING BY ON CH. 16.

(Attach. 1, Carman Decl., ¶ 5.)

above the water. (Compl., Doc. 1 ¶ 18.) As a result of the incident, the fishing partner was killed and Thacker allegedly suffered physical injuries. (Compl., Doc. 1 ¶ 18.)

TVA had two patrol boats on the river at the site of the downed conductor crewed by TVA employees, but the river is over a mile wide at that location. (Compl., Doc. 1 ¶ 12, 14.) The patrol patterns of the boats were such that neither patrol boat was in a location to block Thacker's boat from proceeding as it approached the downed conductor at high speed. (Compl., Doc. 1 ¶ 12; Attach. 1, Carman Decl., ¶¶ 6-7.)

TVA'S CHALLENGED CONDUCT

The Complaint alleges that "TVA should have instituted heightened and stringent criteria for contractors to qualify to perform boat patrol activities and should have instituted and/or required training for contractors in the proper procedures to patrol boat traffic on the Tennessee River in the event of any emergency situation." (Compl., Doc. 1 ¶ 6.) The Complaint also alleges that TVA

- failed to properly qualify the contractors and/or employees that worked on this job;
- failed to properly plan for emergency situations;
- failed to properly investigate the qualifications and/or training of its contractors and/or employees;

- failed to properly train its contractors and/or employees;
- failed to properly instruct its contractors and/or employees in how to respond to the emergency and protect the public; and
- failed to properly supervise its contractors and/or employees in their response to the emergency and the inadequate steps taken to protect the public.

(Compl., Doc. 1 ¶ 21.)

In sum, then, the Complaint alleges that TVA failed to properly "qualify" and "train" its employees, failed to properly "plan for emergency situations," and failed to properly "instruct" and "supervise" its employees in their response to the emergency.

ARGUMENT

I. TVA's motion is a factual attack on the existence of subject matter jurisdiction.

In the Eleventh Circuit, it is well-settled that a Rule 12(b)(1) motion based on the discretionary function exception like TVA's motion here is a "factual" attack on the existence of subject matter jurisdiction. *U.S. Aviation Underwriters, Inc. v. United States*, 562 F.3d 1297, 1299 (11th Cir. 2009). In a factual challenge to the existence of subject matter jurisdiction, the plaintiff has the burden of proving jurisdiction in order to survive the motion, and no presumptive truthfulness attaches to the allegations of the complaint. *Slappey v. U.S. Army*

Corps of Eng'rs, 571 F. App'x 855, 856 (11th Cir. 2014) ("In such a case, the plaintiff bears the burden of proving that jurisdiction exists, *i.e.*, that the discretionary function exception does not apply."); *OSI, Inc. v. United States*, 285 F.3d 947, 951 (11th Cir. 2002) ("In the face of a factual challenge to subject matter jurisdiction, the burden is on the plaintiff to prove that jurisdiction exists."). In considering such a challenge, the Court may consider extrinsic evidence such as an affidavit. *Slappey*, 571 F. App'x at 856.

II. TVA is an executive branch agency of the United States and the discretionary function exception applies to TVA.

TVA is a constitutionally authorized executive branch agency of the United States, created by and existing pursuant to the TVA Act of 1933, 16 U.S.C. §§ 831 et seq. *See, e.g., Bobo v. AGCO Corp.*, 981 F. Supp. 2d 1130, 1137 (N.D. Ala. 2013) ("The Tennessee Valley Authority is a constitutionally authorized corporate agency and instrumentality of the United States."); *TVA v. United States*, 51 Fed. Cl. 284, 285 (2001) ("Both TVA and DOE are agencies within the executive branch, the heads of which are subject to presidential removal."). Pursuant to the TVA Act's sue-and-be-sued clause at 16 U.S.C. § 831c(b), TVA is generally subject to suit in its own name. *See United States v. Smith*, 499 U.S. 160, 168-69 (1991) ("Courts have read [the TVA Act's] 'sue or be sued' clause as making the TVA liable to suit in tort, subject to certain exceptions."). But that waiver of immunity does not alter TVA's status as an executive branch agency. *See U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S.

736, 744 (2004) (internal citations omitted) ("The sue-and-be-sued clause waives immunity, and makes the Postal Service amenable to suit, as well as to the incidents of judicial process. While Congress waived the immunity of the Postal Service, Congress did not strip it of its governmental status. The distinction is important."). Nor does it make TVA subject to suit in tort for the performance of discretionary functions—an exception to TVA's waiver of sovereign immunity that is grounded in constitutional separation of powers. *See Gordon v. Lykes Bros. S.S. Co.*, 835 F.2d 96, 100 (5th Cir. 1988) ("[D]eep constitutional roots . . . impart strength to the discretionary function exception."); *Payton v. United States*, 636 F.2d 132, 143 (5th Cir. 1981) ("The crux of the concept embodied in the discretionary function exception is that of the separation of powers.").

Thus, a number of decisions of this Court and the Eleventh Circuit hold that the discretionary function exception is applicable to TVA. For example, in holding the discretionary function exception applicable to certain asbestos exposure tort claims in *Bobo v. AGCO Corp.*, 981 F. Supp. 2d 1130, 1145 (N.D. Ala. 2013) (Smith, J.), the Court stated:

> The Eleventh Circuit affirmed the application of the discretionary function doctrine to TVA's statutorily-authorized, power-production activities, including management decisions at a TVA coal-fired power plant, in *Johns v. Pettibone Corp.*, 843 F.2d 464, 467 (11th Cir. 1988).

Similarly, in *North Alabama Electric Cooperative v. TVA*, 862 F. Supp. 2d 1291, 1301 (N.D. Ala. 2012) (Smith, J.), in holding TVA immune from allegations of promissory fraud, the Court stated:

> Although TVA generally is subject to suit, "courts have held that TVA cannot be subject to liability when engaged in certain governmental functions." *Peoples National Bank of Huntsville, Alabama v. Meredith*, 812 F.2d 682, 685 (11th Cir. 1987) (citations omitted). That so-called "nonliability" doctrine applies to discretionary governmental functions. *Id.*

Likewise, in *Dickerson* v. *TVA*, No. CV94-B-1031-NW, Mem. Op. at 10 n.6 (N.D. Ala. Jan. 31, 1995) (Blackburn, J.) (Attach. 2), in holding the discretionary function exception applicable to preclude personal injury claims arising out of TVA's alleged negligent maintenance of the roadway over Wheeler Dam, the Court stated:

> The principle of nonliability for discretionary functions has been held to apply to tort suits filed against TVA, in the same manner as it applies to tort suits involving other government agencies by virtue of the discretionary function exception, 28 U.S.C. § 2680(a) (1988), to the Federal Tort Claims Act. *E.g., Peoples Nat'l Bank v. Meredith*, 812 F.2d 682, 684-85 (11th Cir. 1987); *Queen v. TVA*, 689 F.2d 80, 86 (6th Cir.

1982), *cert. denied*, 460 U.S. 1082 (1983); *Morris v. TVA*, 345 F. Supp. 321 (N.D. Ala. 1972).

Hill v. TVA, 842 F. Supp. 1413 (N.D. Ala. 1993) (Hancock, J.), is in accord. There, the Court dismissed tort claims arising out of TVA's operation and management of Browns Ferry Nuclear Plant on discretionary function grounds, because "[w]hen TVA is engaged in a governmental function that is discretionary in nature, where the United States itself would not be liable, TVA cannot be subject to liability." *Id.* at 1420.

Atchley v. TVA, 69 F. Supp. 952 (N.D. Ala. 1947) (Lynne, J.), also is in accord. There, the Court dismissed tort claims against TVA based on alleged improper operation of Wheeler Reservoir, stating:

> The present case comes clearly within the principle that the performance by executive officers of discretionary governmental duties entrusted to them by statute is not subject to judicial review. This principle has been reiterated time and again in mandamus proceedings to compel executive action, in injunction suits to prevent executive action, and in actions such as that at bar for damages claimed to have resulted from executive action.

Id. at 955 (footnotes omitted).

III. A two-part test is utilized to determine the applicability of the discretionary function exception.

United States v. Gaubert, 499 U.S. 315, 324-25 (1991), established a two- part test for the discretionary function exception. Under *Gaubert*, challenged conduct of a Federal agency is not subject to suit in tort if (1) the challenged conduct was not in violation of a ***mandatory*** Federal statute, regulation or policy which dictated a ***specific*** course of action; and (2) the challenged conduct was ***susceptible*** to policy analysis involving political, social and economic judgments.

Numerous Eleventh Circuit cases illustrate the application of *Gaubert's* two- part test. *E.g.*, *Lewis v. United States*, 618 F. App'x 483 (11th Cir. 2015) (affirming district court holding that the discretionary function exception applied to decisions by prison guard about how to escort prisoner who slipped and fell while returning to cell after showering); *Slappey v. U.S. Army Corps of Eng'rs*, 571 F. App'x 855 (11th Cir. 2014) (affirming district court holding that that the discretionary function exception applied to Corps of Engineers decisions about the appropriate safety features for a dam and the placement of those features); *Hogan v. U.S. Postmaster General*, 492 F. App'x 33 (11th Cir. 2012) (affirming district court holding that the discretionary function exception applied to Postal Service decisions regarding public safety in slip-and-fall case at a post office); *U.S. Aviation Underwriters, Inc. v. United States*, 562 F.3d 1297, 1300 (11th Cir. 2009) (affirming district court holding that the discretionary function exception applied to alleged

negligence of National Weather Service in failing to issue warnings of clear air turbulence); *Cranford v. United States*, 466 F.3d 955, 959-61 (11th Cir. 2006) (affirming district court holding that the discretionary function exception applied to Coast Guard's alleged improper marking of and failure to remove a submerged wreck); *OSI, Inc. v. United States*, 285 F.3d 947, 952-53 (11th Cir. 2002) (affirming district court holding that the discretionary function exception applied to Air Force decisions regarding disposal of waste material in off-base landfill); *Monzon v. United States*, 253 F.3d 567, 568-69 (11th Cir. 2001) (affirming district court holding that the discretionary function exception applied to decision of whether to provide warnings of increased rip currents at beach controlled by the National Park Service); *Hughes v. United States*, 110 F.3d 765, 768-69 (11th Cir. 1997) (affirming district court holding that the discretionary function exception applied to Postal Service decisions regarding safety and security at a post office); *Autery v. United States*, 992 F.2d 1523, 1531 (11th Cir. 1993) (reversing district court decision and holding that discretionary function exception applied to dangerous tree inspection program at a national park).

There are several fundamental legal points related to application of the two- part test that are pertinent to the analysis here. First, the conduct of the Government being challenged must be sufficiently defined so the two-part test can be applied to the challenged conduct. *E.g.*, *Hogan v. U.S. Postmaster General*, 492 F. App'x 33, 35 (11th Cir. 2012) ("'Before we address whether the government's conduct violated a mandatory

regulation or policy, we must determine exactly what conduct is at issue.'" (quoting *Autery v. United States*, 992 F.2d 1523, 1527 (11th Cir. 1993)). Here, as noted above, the challenged conduct is defined in the Complaint for purposes of the discretionary function analysis.

That the challenged conduct may have been performed at an "operational level" as opposed to a "planning level" does not take the conduct outside the exception. *E.g.*, *Lewis v. United States*, 618 F. App'x 483, 487 (11th Cir. 2015) ("The fact that Officer Locker was exercising his discretion at the operational level, as opposed to the planning level, does not remove his action from the discretionary function exception.").

Negligence by the Government is irrelevant to the test; indeed, if freedom from negligence were required, the discretionary function exception would fail at the precise time it would be needed. *E.g.*, *Autery*, 992 F.2d at 1528 (pointing out that the "district court's analysis appears to collapse the question of whether the Park Service was negligent into the discretionary function inquiry" and citing cases for the principle that "[n]egligence is simply irrelevant to the discretionary function inquiry") (citation omitted).

The question is not whether a Government employee actually weighed policy considerations, but whether the nature of the challenged conduct is susceptible to policy analysis. *E.g.*, *Lewis v. United States*, 618 F. App'x 483, 486-87 (11th Cir. 2015) ("This Court looks to the nature of the actions taken and whether they are susceptible to policy analysis,

not to whether the employee actually weighed policy considerations before acting.").

And where there is room for a Government employee to exercise discretion, "'it must be presumed that the agent's acts are grounded in policy when exercising that discretion.'" *Slappey v. U.S. Army Corps of Eng'rs*, 571 F. App'x 855, 860 (11th Cir. 2014) (quoting *United States v. Gaubert*, 499 U.S. 315, 324 (1991)).

IV. The Discretionary Function Exception Applies Here.

The challenged conduct here is defined in the Complaint. As noted earlier the Complaint asserts that TVA failed to properly qualify and train its employees, failed to properly plan for emergencies, and failed to properly instruct and supervise its employees in their response to the emergency All of this challenged conduct is protected by the discretionary function exception.

As to the first part of the discretionary function test, the Complaint does not identify any mandatory Federal statute, regulation, or policy that specifically required TVA to act differently than it did. And, to TVA's knowledge, there was no such mandatory Federal statute, regulation, or policy in effect on July 30, 2013.

As to the second part of the discretionary function test, it is well settled that "'safety decisions represent an exercise of discretion giving rise to governmental immunity.'" *Johns v. Pettibone Corp.*, 843 F.2d 464, 467 (11th Cir. 1988) (quoting from and affirming a decision of this Court (*Johns v. Pettibone*

Corp., No. CV82-L-5630-NE (N.D.Ala. March 25, 1986) (Lynne, J.)) which involved an electrocution at TVA's Widows Creek Fossil Plant allegedly caused by decisions of TVA managers in their assignment and delegation of safety responsibilities). The reasoning of the Supreme Court's landmark discretionary function decision, *Dalehite v. United States*, 346 U.S. 15 (1953), *aff'g, In re Texas City Disaster Litig.*, 197 F.2d 771 (5th Cir. 1952) (en banc), illustrates the analysis, and it is directly applicable to the situation here.

Dalehite involved personal injury, death, and property damage claims arising out of the 1947 Texas City disaster, in which much of the city was destroyed by explosion and fire. *In re Texas City Disaster Litig.*, 197 F.2d at 772. The source of the disastrous explosion was ammonium nitrate fertilizer, which the Government had produced and was shipping through the port of Texas City as part of a foreign aid program. Among other things, the district court found the Government liable based on Government negligence in various phases of the manufacturing process, including the Government's use of TVA specifications allowing high bagging temperatures, which increased production and lowered costs but amplified the risk of fire and explosion. *Dalehite*, 346 U.S. at 39-40. The district court, after a trial, found the Government liable.

The Fifth Circuit reversed, holding that the discretionary function exception precluded Government liability. As to the high bagging temperatures adopted from TVA's specifications, the Fifth Circuit stated:

> Determination of bagging temperatures was clearly within the discretion of the proper officers. A suggestion was made to the Chief of Ordnance that it would be better practice to bag the product at 120 degrees Fa[h]renheit rather than at 200 degrees. The commanding officers at the ordnance plants reported that this procedure would reduce production to less than half of that demanded by the fertilizer program and the world situation . . . . This was nothing more nor less than the exercise of the discretionary function by reaching conclusions on balanced considerations for which the United States are exempt from liability "whether or not the discretion involved be abused."

In re Texas City Disaster Litig., 197 F.2d at 779.

The Supreme Court affirmed, pointing out that the challenged conduct involved decisions balancing safety risks against other project goals (cost and production schedule benefits of expedited manufacturing and shipping of fertilizer to accomplish foreign aid purposes) and was thus the kind of conduct precluded from judicial review in tort by the discretionary function doctrine:

> [T]he decision to bag at the temperature fixed was also within the [discretionary function] exception. Maximum bagging temperatures were first established under the TVA specifications. That they were the

> product of an exercise of judgment, requiring consideration of a vast spectrum of factors, including some which touched directly the feasibility of the fertilizer export program, is clear. . . . It would be possible to keep the product in graining kettles for a longer period or to install cooling equipment. But both methods would result in greatly increased production costs and/or greatly reduced production. This kind of decision is not one which the courts, under the [discretionary function exception], are empowered to cite as "negligence" . . . .

Dalehite, 346 U.S. at 40-41.

The reasoning of *Scruggs v. United States*, 959 F. Supp. 1537 (S.D. Fla. 1997), also is directly applicable to the situation here. In *Scruggs*, the pilot of a small airplane sued the Government for alleged damages and injuries caused by severe turbulence resulting from a high-speed Air Force jet fighter passing extremely close to plaintiff's small airplane as he was flying near Avon Park Gunnery Range in Florida. The incident occurred in "special use airspace" that was designated as a "Military Training Route" and used by Air Force fighters for high-speed low-level approaches to the gunnery range. The Government (through the Federal Aviation Administration) had issued Notices to Airmen about Air Force activities in the special use airspace and those Notices were available to civilian pilots, but Scruggs did not consult the Notices in planning the route of his flight. Among other things,

Scruggs claimed the Government was negligent in failing to adopt more safety measures than it did; specifically, Scruggs faulted the Government for failing to establish a radar site at the range to monitor nearby air traffic, failing to install a collision avoidance electronic system, and failing to designate the Military Training Route as restricted airspace. *Id.* at 1548. The court held that the Government's alleged negligence for failing to adopt more safety measures than it did fell squarely within the discretionary function exception:

> [T]he government is immune from suit under the discretionary function exception with respect to Plaintiffs' claim that the government was negligent for failing to implement certain safety measures.

959 F. Supp. at 1548.

Numerous other decisions are in accord that judgments by Government officials involving safety levels for Government activities on premises open to the public are within the discretionary function exception. *See, e.g., Slappey v. U.S. Army Corps of Eng'rs*, 571 F. App'x 855, 860 (11th Cir. 2014) ("[T]he Corps' decisions about the appropriate safety features for the dam, and the placement of those features, implicated many policy considerations."); *Hughes v. United States*, 110 F.3d 765, 768 (11th Cir. 1997) (holding discretionary function exception applicable to Postal Service decisions regarding safety and security at a post office because "security decisions such as the ones challenged here—the posting of security personnel in the lobby or in the

parking lot, the location and intensity of lighting, and the planting and maintenance of trees and shrubby—are left to the discretion of the Security Control Officer for each post office").

As to TVA's alleged failure to properly qualify, train, and instruct its employees for emergencies, and to properly supervise its employees in their response to the emergency, that is precisely the kind of challenged conduct that courts have universally found to be within the discretionary function exception. As shown by the following decisions, the courts have uniformly found that discretionary function exception precludes tort claims based on the Government's alleged negligent hiring, retention, training, and assignment of individuals to perform Government work (unless, of course, the individual does not have a specific certification mandated by the Government).

- *Snyder v. United States*, 590 F. App'x 505, 509-10 (6th Cir. 2014) (internal citations omitted):[2]

> This Circuit has consistently held that agency ***supervisory*** and ***hiring*** decisions fall within the discretionary function exception. This conclusion is consistent with the precedent of our sister Circuits.
>
> . . . .
>
> Because [agency] ***hiring***, ***supervision***, ***training***, and ***retention*** require policy judgments—the type that

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[2] Emphasis added here and throughout this brief unless otherwise noted.

> Congress intended to shield from tort liability—and because Plaintiff failed to allege the United States' nonconformance with any applicable regulations, we find that the district court lacked subject matter jurisdiction.

- *Dovenberg v. United States*, 407 F. App'x 149, 149 (9th Cir. 2010):

> Decisions regarding the ***training*** and ***supervision*** of government employees "fall squarely within the discretionary function exception" . . . .

- *LeRose v. United States*, 285 F. App'x 93, 97 (4th Cir. 2008):

> [D]ecisions regarding the ***hiring***, ***supervision*** and ***retention*** of [Government employees] are precisely the type of decisions that are protected under the discretionary function exception. . . . The hiring of an employee involves several public policy considerations including the weighing of the qualifications of candidates, weighing of the backgrounds of applicants, consideration of staffing requirements, evaluation of the experience of candidates, and assessment of budgetary and economic considerations.

- *Santana-Rosa v. United States*, 335 F.3d 39, 43-44 (1st Cir. 2003):

> Turning to the second segment of the *Gaubert* inquiry, the court must also conclude that decisions regarding . . . ***work assignments*** are susceptible to policy-related analysis.

- *Kelly v. United States*, 241 F.3d 755, 763 (9th Cir. 2001):

> We recently confirmed that "[t]his court and others have held that decisions relating to the . . . ***training*** . . . of employees usually involve policy judgments of the type Congress intended the discretionary function exception to shield." *Vickers v. United States*, 228 F.3d 944, 950 (9th Cir. 2000) (concluding that the Immigration and Naturalization Service's decision to excuse an employee from handgun ***training*** "involved a judgment that is subject to the discretionary function exception and is not actionable"); *accord Nurse v. United States*, 226 F.3d 996, 1001 (9th Cir. 2000) (concluding that alleged negligent and reckless ***training*** "fall[s] squarely within the discretionary function exception"); *Gager*, 149 F.3d at 922 (concluding that Postal Service's decision not to provide ***training*** to detect mail bombs "was clearly rooted in social, economic, and political policy" and protected by the discretionary function exception); *Fang*, 140 F.3d at 1242 (noting that decisions regarding ***training*** of emergency medical

> technicians are "fully protected by the discretionary function exception"); *Burkhart*, 112 F.3d at 1217 ("The extent of ***training*** with which to provide employees . . . [is] surely among those [decisions] involving the exercise of political, social, or economic judgment."); *Redmon v. United States*, 934 F.2d 1151, 1156 (10th Cir. 1991) (concluding that the FAA's decision to allow single- engine-rated pilots to carry over that rating to a multi-engine rating without a flight test "falls squarely within the discretionary function exception").

- *Burkhart v. Wash. Metro. Area Transit Auth.*, 112 F.3d 1207, 1217 (D.C. Cir. 1997) (internal citations omitted):

> The ***hiring, training,*** and ***supervision*** choices that WMATA faces are choices "susceptible to policy judgment." The ***hiring*** decisions of a public entity require consideration of numerous factors, including budgetary constraints, public perception, economic conditions, "individual backgrounds, office diversity, experience and employer intuition." . . . The extent of ***training*** with which to provide employees requires consideration of fiscal constraints, public safety, the complexity of the task involved, the degree of harm a wayward employee might cause, and the extent to which

> employees have deviated from accepted norms in the past. Such decisions are surely among those involving the exercise of political, social, or economic judgment.

- *Hudson v. United States*, No. 2:06-CV-01, 2008 WL 517009, at *6 (E.D. Tenn. Feb. 25, 2008) (holding the discretionary function doctrine to preclude alleged negligence in the hiring and supervision of contract physicians by the Veterans Administration):

> A review of relevant case law reveals a ***myriad*** of cases which hold that the ***hiring***, ***training***, and ***supervising*** of employees are discretionary in nature and fall within the discretionary function exception. *United States v. Gaubert*, 499 U.S. 315, 332-34, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991); *United States v. Varig Airlines*, 467 U.S. 797, 819-20, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984); *Wood v. United States*, 290 F.3d 29 (1st Cir. 2002); *Vickers v. United States*, 228 F.3d 944, 950 (9th Cir. 2000), *Burkhart v. Washington Metropolitan Area Transit Authority*, 112 F.3d 1207 (D.C. Cir. 1997); *Layton v. United States*, 984 F.2d 1496 (8th Cir.), *cert denied*, 510 U.S. 877, 114 S. Ct. 213, 126 L. Ed. 2d 170 (1993); *Fortney v. United States*, 912 F.2d 722 (4th Cir. 1990); *Michael v. United States*, 751 F.2d 303, 307 (8th Cir. 1985).

- *Scruggs v. United States*, 959 F. Supp. 1537, 1548 (S.D. Fla. 1997):

> [D]ecisions pertaining to . . . personnel ***training*** clearly involve the balancing of social, economic and political objectives and, thus, fall squarely within the protection of the discretionary function exception to the FTCA.

Plaintiffs have made no contention that any pertinent TVA employees failed to possess any specific certifications mandated by the Government. Accordingly, as shown by these cases, the discretionary function doctrine precludes Plaintiffs' claims based on the alleged negligent hiring, retention, training, assignment, and supervision.

CONCLUSION

For the reasons stated and upon the authorities cited, the Court should dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(1).

Respectfully submitted,

s/James S. Chase
Edwin W. Small, Deputy General Counsel
James S. Chase, Senior Attorney
David D. Ayliffe, Senior Attorney
TVA GENERAL COUNSEL'S OFFICE
400 West Summit Hill Drive
Knoxville, Tennessee 37902-1401
Telephone 865.632.4239

Attorneys for Tennessee Valley Authority

CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically through the Court's ECF system on the date shown in the document's ECF footer. Notice of this filing will be sent by operation of the Court's ECF system to counsel for all other parties as indicated on the electronic filing receipt and listed below. Parties may access this filing through the Court's ECF system.

Gary V. Conchin, Esq.
Kenneth B. Cole, Esq.
Taylor Rouse, Esq.
Conchin, Cloud & Cole, LLC
2404 Commerce Court, SW
Huntsville, Alabama
Phone (256) 384-7777
gary@conchincloudcole.com
kenny@conchincloudcole.com
taylor@conchincloudcole.com

s/James S. Chase
Attorney for Tennessee Valley Authority

[ENTERED: March 29, 2016]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

GARY THACKER and VENIDA THACKER,	)	
Plaintiffs,	)	
v.	)	No. 5:15-cv-01232-AKK
TENNESSEE VALLEY AUTHORITY,	)	
Defendant.	)	

PLAINTIFFS GARY AND VENIDA THACKER'S RESPONSE IN OPPOSITION TO TENNESSEE VALLEY AUTHORITY'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

GARY V. CONCHIN, Esq.
CONCHIN, CLOUD & COLE
2404 Commerce Court
Huntsville, Alabama 35801
Telephone (256) 705-7777
Facsimile (256) 705-7778
gary@conchincloudcole.com

KENNETH B. COLE, JR., Esq.
CONCHIN, CLOUD & COLE,
2404 Commerce Court

Huntsville, Alabama 3501
Telephone (256) 705-7777
Facsimile (256) 705-7778
kenny@conchincloudcole.com

TAYLOR ROUSE, Esq.
CONCHIN, CLOUD & COLE, LLC
2404 Commerce Court
Huntsville, Alabama 35801
Telephone (256) 705-7777
Facsimile (256) 705-7778
taylor@conchincloudcole.com

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

GARY THACKER, AND VENIDA THACKER,	)	
Plaintiff,	)	
v.	)	**No. 5:15-cv-1232-AKK**
TENNESSEE VALLEY AUTHORITY,	)	
Defendants.	)	

PLAINTIFFS' RESPONSE IN OPPOSITION TO TENNESSEE VALLEY AUTHORITY'S MOTION TO DISMISS

Plaintiffs Gary and Venida Thacker respond in opposition to Tennessee Valley Authority's ("TVA") Motion to Dismiss for Lack of Subject Matter Jurisdiction Based (Doc. 11) as follows:

INTRODUCTION

The TVA Act's "Sue and be Sued" clause constitutes a broad waiver of sovereign immunity. TVA has a unique existence and performs both governmental and non-governmental functions. Courts have consistently held that TVA's power generating activities are not a governmental function, and therefore are not protected by discretionary immunity. TVA's actions complained of herein were commercial activities and are not protected by any immunity. Therefore, this Honorable Court has subject matter jurisdiction over this case.

PERTINENT FACTS

Plaintiffs incorporate by reference as if set forth fully herein Paragraphs 6 through 22 of their Complaint (Doc. 1) because no discovery has occurred and Plaintiffs have no new information.

TVA BACKGROUND

Although formed by an act of Congress, TVA is a corporation. The purposes of the TVA Enabling Act were to improve navigability and to provide for flood control of the Tennessee River, reforestation and proper use of marginal lands in the Tennessee Valley, and agricultural and industrial development of the valley. *See* 16 U.S.C. § 831. While the Act also empowered TVA to dispose of "surplus power" generated as an incident to navigation and flood control, those activities are subordinated to the needs of navigation and flood control. *See* 16 U.S.C. §§ 831i; 83lh-1; Tennessee Elec. Power Co. v. TVA,

21 F. Supp. 947, 959 (E.D. Tenn. 1938).[1] Congress "intend[ed] that [TVA] shall have much of the essential freedom and elasticity of a private business corporation." H.R. Rep. No. 130, 73d Cong., 1st Sess., at 19 (1933). "TVA operates in much the same way as an ordinary business corporation, under the control of its directors in Tennessee, and not under that of a cabinet officer or independent agency headquartered in Washington." NRDC v. TVA, 459 F.2d 255, 257 (2d Cir. 1972).

TVA has used this flexibility and independence to become the largest public power company in the U.S., supplying electricity to more than 9 million customers and generating more than $10.8 billion in annual revenue.[2] In light of the growth of TVA's power business, Congress added Section 15d to the TVA Act in 1959, making all of TVA's power programs entirely self-financed. *See* 16 U.S.C. § 831n-4. Section 15d terms TVA's power program the "Corporation's power business." 16 U.S.C. § 831n-4(t). It also provides that TVA may issue bonds to finance its power programs, which are not obligations of, or guaranteed by, the United States. *See* 16 U.S.C. § 83ln-4(b).

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[1] Tennessee Elec. Power Co. v. TVA, 21 F. Supp. 947, 959 (E.D. Tenn. 1938), *aff'd on other grounds*, 306 U.S. 118 (1939) (upholding TVA project as "reasonably adapted to use for combined flood control, navigation, power and national defense, and that in actual operation the creation of energy is subordinated to the needs of navigation and flood control.").

[2] *See* TVA 2015 Annual Report, at 8, available at https://www.snl.com/Cache/1001205059.PDF?Y=&O=PDF&D=&FID=1001205059&T=&IID=4063363.

TVA is authorized to charge rates for power that will satisfy the foregoing demands and "such additional margin as the Board may consider desirable." 16 U.S.C. § 831n-4(f). TVA has broad latitude in setting rates, the only restriction being that it give "due regard" to the objective that power be sold at rates "as low as are feasible." Id. TVA has also successfully argued that it has unfettered discretion to set rates for electric power[3] and that it is not part of the Executive Branch. In TVA v. EPA, 278 F.3d 1184 (11th Cir. 2002), TVA, using private attorneys, filed suit against the Environmental Protection Agency to avoid compliance with an air pollution control order and vigorously argued that the case presented a valid controversy under Article III due to its separation from the Executive Branch. The Eleventh Circuit agreed and said:

> From its inception, TVA has enjoyed an independence possessed by perhaps no other federal agency... TVA's independence is underscored by its corporate form, its maintenance of a separate legal staff, its removal from centralized control in Washington, its discretionary ratemaking authority, and its exemption from at least 16 provisions of the Administrative Procedures Act.

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[3] *See* Consolidated Aluminum Com. v. TVA, 462 F. Supp. 464, 474 (M.D. Tenn. 1978) (setting of rates is committed to TVA and is not subject to judicial review); Mobil Oil Corp. v. TVA, 387 F. Supp. 498, 506-07 (N.D. Ala. 1974) (same).

TVA v. EPA, 278 F.3d 1184, 1192 (11th Cir. 2002). In opposing *certiorari*, TVA argued that Congress made it independent of centralized federal control so that TVA can function much like a private business corporation.[4] The Supreme Court denied certiorari.[5] As a result of this independence and minimal federal oversight, TVA's power generating activities are not considered a government function and are not protected by discretionary immunity.

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[4] "[T]he Eleventh Circuit thoroughly considered and rejected that contention [that TVA and EPA are a "single entity"], holding that 'TVA possesses unique independence as a federal agency.' This is clearly correct. Congress indicated in the Conference Report on the TVA Act that '[w]e intend that the corporation shall have much of the essential freedom and elasticity of a private business corporation.' The TVA Act confirms this, providing, among other things, that TVA is run by a Board of Directors [which are not appointed by the president], that TVA's employees are not subject to the federal Civil Service laws, that TVA's purchasing activities are independent of general federal procurement laws, and that TVA's financing bonds are not obligations of the United States...Indeed, TVA currently receives no congressional appropriations for its activities. Congress has repeatedly acknowledged TVA's unique nature, for example by precluding suit in the Court of Federal Claims against TVA, and exempting TVA from the Federal Tort Claims Act. And this Court has recognized that TVA 'is a corporate entity, separate and distinct from the Federal Government itself.' Pierce v. United States, 314 U.S. 306, 310 (1941)." Brief of TVA in Opp. to Pet. For Writ of Cert., 2004 WL 716605, at 14-15, TVA v. EPA, (No. 03-1162); *see also* Id. at 14, n.10 (listing additional hallmarks of independence from federal government).

[5] *See* Leavitt v. TVA, 541 U.S. 1030 (2004).

ARGUMENT

I. TVA'S "SUE AND BE SUED" CLAUSE CONSTITUTES A BROAD WAIVER OF SOVEREIGN IMMUNITY.

"[T]he United States, as sovereign, is immune from suit save as it consents to be sued... and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit... A waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed." U.S. v. Mitchell, 445 U.S. 535, 539 (1980). However, TVA is not the "United States" because Congress expressly provided that TVA "May sue and be sued in its corporate name." *See* 16 U.S.C. § 831c(b). Courts have consistently held that TVA does not benefit from sovereign immunity because of the "Sue and be Sued" clause.[6]

However, the courts have held the broad waiver of sovereign immunity of "Sue and Be Sued" clauses is subject to certain exceptions, such as when the entity is engaged in certain governmental functions.[7] This governmental function immunity

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[6] *See* United States v. Smith, 499 U.S. 160, 168-69 (1991)("Courts have read this 'sue or be sued' clause as making the TVA liable to suit in tort, subject to certain exceptions"); Peoples Nat'l Bank of Huntsville v. Meredith, 812 F.2d 682, 684 (11th Cir. 1987)("doctrine of sovereign immunity does not bar suit against TVA"); Stevens v. TVA, 712 F.2d 1047, 1051 (6th Cir. 1983)("The plain implication is that Congress intended that, for ordinary purposes of litigation, suits against the TVA are not suits against the United States."); Queen v. TVA, 689 F.2d 80, 85 (6th Cir. 1982)("this [sue and be sued] language was intended to be a broad waiver of sovereign immunity").

[7] *See* Peoples National Bank of Huntsville, Alabama v. Meredith, 812 F.2d 682, 684-85 (11th Cir. 1987).

exception is limited to situations arising out of the exercise of wholly governmental functions, where the entity acts solely as the government's agent and where the U.S. itself would not be liable, and includes when the subject governmental function is discretionary.[8] The Supreme Court has repeatedly held that when Congress launches a federal entity into the commercial world and endows it with a "Sue and be Sued" clause, the federal entity has no immunity and is no less amenable to judicial process than a private enterprise under like circumstances would be unless it can make a "clear showing" that "an implied restriction of the general authority is necessary to avoid grave interference with the performance of a ***governmental function*** (emphasis added)." FHA v. Burr, 309 U.S. 242, 245 (1940).[9]

TVA cannot satisfy either prong of the controlling test requiring a governmental function and a grave interference. TVA's electric power functions are a commercial function, and immunity is not necessary to avoid a grave interference with

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[8] *See* Edwards v. Tennessee Valley Authority, 255 F.3d 318, 322 (6th Cir. 2001); Peoples, 812 F.2d at 685.

[9] *See also* FDIC v. Meyer, 510 U.S. 471 480 (1994)(same); Loeffler v. Frank, 486 U.S. 549, 554 (1988)(same); Franchise Tax Bd. of Cal. v. United States Postal Serv., 467 U.S. 512,520 (1984) ("[U]nder Burr not only must we liberally construe the sue-and-be-sued clause, but also we must presume that the [federal entity's] liability is the same as that of any other business."); Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381, 391-92 (1939)(the Court rejected immunity for a federal corporation in a tort case and expressly noted that TVA and other federal corporations lack immunity because of their sue and be sued clauses).

TVA's electric power functions. As such, TVA has no discretionary immunity for its commercial actions and actions resulting therefrom, and discretionary immunity analysis is simply not at issue.

A. TVA's Generation, Transmission, and Sale of Electric Power Constitute a Commercial, Not a Governmental, Function.

Consistent with the controlling test requiring TVA to establish a governmental function to be immune, an unbroken chain of case law extending back over 60 years separates TVA's commercial power generating functions from its governmental functions, such as navigation, flood control, fertilizer development, administration of government loans and dissemination of public information. The seminal case distinguishing these two functions is Grant v. TVA, 49 F. Supp. 564 (E.D. Tenn. 1942). In Grant, a farmer sued TVA for flood damage to his crops allegedly caused by TVA's dams and navigation improvements. The court distinguished the two sets of functions:

> By a long line of cases it has definitely been settled that neither the government nor its instrumentalities would have to respond in damages arising in the development and maintenance of waters for purposes of navigation and flood control, including claims for negligence. It may be noted that this position is not because of governmental immunity from suit but on the grounds of public policy... But

> the functions of the defendant in the commercial field are entirely different. Upon principle and authority, it is quite clear that the government should respond in damages for wrongs committed when it is engaged in the same activities as its citizens. It is my judgment that Congress intended that the defendant can be sued for all wrongs committed for conduct pertaining to its generating, use and sale of electric energy made from the power created by its dams.

Id. at 566. Since Grant, the courts have consistently observed this fundamental distinction between TVA's activities relating to electricity generation, such as transmission and sale, and its government functions, such as navigation and flood control, in holding that TVA has no immunity for actions related to its power production programs.[10] The

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[10] *See* Adams v. TVA, 254 F. Supp. 78, 80 (E.D. Tenn. 1965)(a homeowner sued TVA for damages to his house from TVA's blasting activities for the construction of a fossil fuel fired power plant. The court held TVA to have no immunity and said, "The case at bar is much stronger than the Grant case in that the injuries complained of resulted from excavating for the foundations for a steam plant which had no connections with navigation or flood control."); Latch v. TVA, 312 F. Supp. 1069, 1072 (N.D. Miss. 1970)(a **wrongful death action against TVA for an electrocution from its power lines,** the court drew a line between TVA's "non-governmental acts relating to the distribution and sale of electric power," and its "far-ranging governmental activities in the fields of national defense, navigation and flood control" and held there to be jurisdiction over the complaint.); Brewer v. Sheco Construction Co., 327 F. Supp. 1017, 1019 (W.D. Ky. 1971)(TVA was not immune from strict liability for its blasting activities because the "alleged

distinction was succinctly stated by the Second Circuit in Connecticut v. Am. Elec. Power Co., 582 F.3d 309 (2nd Cir. 2009) when the court was faced with a nuisance action against TVA for the emissions of its power plants. The Second Circuit stated:

> While Congress "endowed TVA with some features governmental in nature, [it] deprived it the benefit of others. One of the governmental features specifically denied to TVA was the right to sovereign immunity, which Congress withheld by virtue of the TVA Act's 'sue-and-be-sued' clause. 16 U.S.C. § 831c(b)." North Carolina ex rel. Cooper v. Tenn. Valley Auth., 439 F. Supp. 2d 486, 490 (W.D.N.C. 2006). In Grant v. Tennessee Valley Authority, 49 F. Supp. 564 (E.D. Tenn. 1942), the district court distinguished between TVA's governmental and commercial activities, finding immunity in the former case and liability in the latter case. Liability was premised on the government "respond[ing] in damages for wrongs committed when it is engaged in the same activities as its

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injuries are the result of the TVA's **construction of a new power substation** which is related to the T.V.A.'s use and sale of electrical energy (emphasis added)."); Smith v. TVA, 436 F. Supp. 151, 153-54, (E.D. Tenn. 1977)(the court held that TVA was not immune from a suit sounding in strict liability and trespass for property damage caused by TVA's blasting activities in connection with an electric generating facility even though the facility was appurtenant to a dam.).

citizens," which included "all wrongs committed for conduct pertaining to its generating, use and sale of electric energy made from the power created by its dams." Id. at 566. Over the years, courts have continued to draw a distinction between TVA's performance of government functions, such as flood control, where it is immune from suit, *see* Edwards v. Tennessee Valley Authority, 255 F.3d 318, 322 (6th Cir. 2001); Peoples National Bank of Huntsville v. Meredith, 812 F.2d 682, 685 (11th Cir. 1987); Queen v. Tennessee Valley Authority, 689 F.2d 80, 85-86 (6th Cir. 1982), and its commercial or non-governmental functions, where it has no immunity, *see* Latch v. Tennessee Valley Authority, 312 F. Supp. 1069, 1072 (N.D. Miss. 1970); Adams v. Tennessee Valley Authority, 254 F. Supp. 78, 80 (E.D. Tenn. 1966)...

The discretionary function exception "insulates the Government from liability if the action challenged . . . involves the permissible exercise of policy judgment." Berkovitz v. United States, 486 U.S. 531, 537, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988). TVA contends that because it is an executive agency with governmental status, the sue-and-be-sued clause in the TVA Enabling Act does not apply to it when it engages in the government functions

of its power program. Plaintiffs respond that the discretionary function exception only applies to the federal government and agencies that engage in governmental functions. They further respond that if the function is non-governmental (e.g., commercial), even if performed by a federal agency, then the exception does not apply. Because TVA's electricity generating activities are commercial functions, Plaintiffs argue that TVA has no immunity from suit with respect to those activities.

Sue-and-be-sued clauses "have long been recognized as broad waivers of sovereign immunity and the 'sue-and-be-sued' clause was specifically intended to be a broad waiver when included in the TVA Act." North Carolina, 439 F. Supp. 2d at 490 (citing cases). Accordingly, "there is certainly no indication that Congress included or intended to include any express 'discretionary function' exemption in the TVA Act." Id. Even so, Congress has, in limited circumstances, recognized that broad waivers of immunity may be circumscribed. In order to determine whether this kind of implied limitation on immunity pertains here, we apply the test to which the Supreme Court refers in Loeffler v. Frank, 486 U.S. 549, 108 S. Ct. 1965, 100 L. Ed. 2d 549 (1988):

> "[W]hen Congress establishes [a sue and be sued] agency, authorizes it to engage in commercial and business transactions with the public, and permits it to 'sue and be sued,' it cannot be lightly assumed that restrictions on that authority are to be implied. Rather if the general authority to 'sue and be sued' is to be delimited by implied exceptions, it must be clearly shown that [(1)] certain types of suits are not consistent with the statutory or constitutional scheme, [(2)] that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or [(3)] that for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense. In the absence of such showing, it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue or be sued,' that agency is not less amenable to judicial process than a private enterprise under like circumstances would be. Id. at 554-55.

Connecticut v. Am. Elec. Power Co., 582 F.3d 309 (2d Cir. 2009), *rev'd in part on other grounds*, Am. Elec. Power Co. v. Connecticut, 564 U.S. 410 (2011). The Second Circuit expressly held that torts committed incident to TVA's power generating activities are not

a governmental function and not protected by the discretionary immunity exception.

The cases holding TVA to be immune, by contrast, deal with government functions such as flood control, navigation improvement, fertilizer development, administration of government loans, and dissemination of public information.[11] The cases cited by TVA likewise deal with immunity for TVA's governmental functions. In Johns v. Pettibone Corp., 843 F.2d 464 (11th Cir. 1988), TVA was not liable for the torts of an independent contractor to which it delegated safety. Thus, neither TVA nor its employees were responsible for the actual injury. In North Alabama Electric Cooperative v. TVA, 862 F. Supp. 2d 1291 (N.D. Ala. 2012), TVA was immune from suit on a fraud and implied contract claim when a company relied on the statements of a person

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[11] *See* Edwards v. TVA, 255 F.3d 318, 322 (6th Cir. 2001)("One of TVA's functions as an instrumentality of the United States is the maintenance of an integrated system of multipurpose dams"); Meredith, 812 F.2d at 685 (government loan program to fisherman administered by TVA was a governmental function); Queen, 689 F.2d at 85 ("in certain limited situations the TVA is exempt from liability arising out of the exercise of certain wholly governmental functions, where the TVA acts solely as the Government's agent and where the United States itself would not be liable" - dissemination of public information regarding energy conservation held to be a governmental function immune from defamation action); In re Agric. Bus. Co., Inc., 613 F.2d 783 (10th Cir. 1980) ("the TVA fertilizer program is governmental in nature, and not industrial or commercial in character"); Lynn v. United States, 110 F.2d 586, 590 (5th Cir. 1940) (as agency of the United States "[i]n the erection of dams," TVA not liable for consequences of manipulating waters under its control); Morris v. TVA, 345 F. Supp. 321 (N.D. Ala. 1972) (same); Atchley v. TVA, 69 F. Supp. 952 (N.D. Ala. 1947) (same).

who was not even a TVA agent. In Dickerson v. TVA, No. CV94-B-1031-NW, Mem. Op. at 10 n.6 (N.D. Ala. Jan. 31, 1995), immunity was predicated on the conditions of a roadway on the Wheeler Dam, a government function related to navigation.[12] In Hill v. TVA, 842 F. Supp. 1413 (N.D. Ala. 1993), TVA was immune from a defamation suit by a terminated employee under the express discretionary immunity provisions of the Federal Employees Liability Reform and Tort Compensation Act. In Atchley v. TVA, 69 F. Supp. 952 (N.D. Ala. 1947), the governmental functions of navigation and flood control precluded a suit for the alleged destruction of crops caused by a flood.

The only case cited by TVA which is directly related to TVA's commercial functions is Bobo v. AGCO Corp., 981 F. Supp. 2d 1130, 1145 (N.D. Ala. 2013). In Bobo, a woman sued TVA and alleged she developed mesothelioma as a result of being wrongfully exposed to asbestos for more than 22 years from laundering the asbestos-laden work clothes worn by her husband, who worked in a TVA nuclear plant. While the court precluded her failure to warn claim based on discretionary immunity, TVA was still liable to her under a normal negligence claim. The Court upheld the jury's verdict and found 1) TVA owed a duty of reasonable care to the wife and others like her; 2) TVA breached its duty of care

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[12] *See also* Edwards v. TVA, 255 F.3d 318, 322 (6th Cir. 2001)(Decedent drowned when he slipped from the rocky shoreline appurtenant to a dam which was maintained and operated by TVA. TVA was immune due to discretionary decisions related to the safety of a dam, a wholly governmental function.)

to the wife by failing to implement reasonable and minimally expensive safety procedures that would have prevented her exposure from her husband's work clothes; 3) Causation; and 4) TVA was not shielded from liability by discretionary function doctrine. *See* Bobo v. TVA, 2015 U.S. Dist. LEXIS 130741 (N.D. Ala. 2015). Further, it is important to note that the actual injury to the wife was not directly tied to TVA's power production activities - the activities themselves did not cause the injury.

As here, TVA's actions were not related to any governmental function. TVA was acting solely in its commercial capacity when it created a hazardous situation that caused Mr. Thacker's injuries and damages. Further, TVA's actions in attempting to warn the public of the hazardous situation it created is not "navigation" under 16 U.S.C. § 831 because "navigation" is the construction of dams and maintenance of rivers and tributaries for the flow of commerce and flood control. TVA cannot establish that its generation of electric power is a governmental function and thus cannot overcome the presumption that Congress waived its immunity in the "Sue and be Sued" clause. Where, as here, Congress has given a federal corporation "the status of a private commercial enterprise," Congress has "cast off" the "cloak of sovereignty" and permitted the entity to sue and be sued like any other commercial enterprise. Loeffler, 486 U.S. at 556. TVA's electricity generation activities, and activities performed as a consequence thereof, constitute a "suable" commercial function.

B. An Implied Restriction of TVA's General Authority to be Sued Is Not "Necessary to Avoid a Grave Interference" with its Electric Power Functions and actions resulting therefrom.

TVA also cannot demonstrate that imposing liability here would "gravely interfere" with its electric power functions. Not only does TVA not allege such in its motion, but any such allegation would be tantamount to TVA saying, "We cannot perform our power generating activities if we have to do them in such a way as to not injure third parties." Public policy cannot stand for such a position. In Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 392 (2nd Cir. 2009), the Second Circuit found that TVA had "available to them practical, feasible and economically viable options for reducing carbon dioxide emissions without significantly increasing the cost of electricity to their customers" and no grave interference existed. Here, TVA had a practical and feasible alternative - it could have safely installed the power lines overhead and then taken reasonable steps in warning the public of the hazardous situation which it created. TVA and its employees failed to undertake certain actions which a reasonable person in like circumstances would have taken.

C. Congress Did Not Intend TVA's "Sue and be Sued" Clause to be Used in a Narrow Sense.

The absence of any codified TVA immunity and statutory construction show a plain purpose of

Congress that the TVA Act's "Sue and be Sued" clause be used in a broad sense.

1. TVA is Expressly Precluded from Immunity in the Federal Tort Claims Act.

Absent an express statute governing a lawsuit against the U.S., one of its agencies or instrumentalities, or one of its employees, suits against a government employee are generally only permitted under the Federal Tort Claims Act ("FTCA"). *See* 28 U.S.C. § 1346(b)(l). Any employee who may be subject to a claim under 28 U.S.C. § 1346(b)(l) is immune under the "discretionary function exception" of 28 U.S.C. § 2680.[13] However, the FTCA expressly states that it shall not apply to "Any claim arising from the activities of the Tennessee Valley Authority." *See* 28 U.S.C. § 2680(1). Thus, the discretionary immunity under § 2680(a) simply does not apply to TVA, as is consistently held by the courts.[14]

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[13] "The provisions of this chapter [28 U.S.C. § 2671 et seq.] and section 1346(b) of this title [28 U.S.C. § 1346(b)] shall not apply to [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

[14] *See* Mays v. TVA, 699 F. Supp. 2d 991, 1006 (E.D. Tenn. 2010)("TVA does not benefit from the discretionary function doctrine as it is embodied in the [FTCA]); North Carolina ex rel. Cooper v. Tennessee Valley Authority, 515 F.3d 344, 349 (4th Cir. 2008) (*quoting* 79 Cong. Reg. 6563-64

2. Since TVA May Sue and be Sued in Its Own Name, It Is Not Entitled to Any Immunity of the United States.

Further, and as discussed above, TVA is not the United States. TVA cannot avail itself of the immunity of the United States because it is a federally-chartered corporation.[15] In fact, as a litigant, TVA routinely takes positions adverse to the U.S.[16] and the only time TVA sues in the name of the U.S. is when it condemns real property or conveys

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(1946)(statement of Sen. Hill) "Congress expressly exempted TVA from the FTCA and its discretionary immunity exception because it intended that legal claims be exercised against the TVA exactly as they could have been exercised against private utility companies."); (Latch v. TVA, 312 F. Supp. 1069, 1072 (N.D. Miss. 1970)(cases dealing with "TVA's activities in the distribution and sale of electric power" involve "a determination of tort liability, quite apart from the scope of the Federal Tort Claims Act, including its exceptions."); Smith v. TVA, 436 F. Supp. at 154 n.3 ("the court fails to see how the TVA can avoid liability on the basis of a construction of a statute which is expressly not applicable to it."); Atchley, 69 F. Supp. at 956 n.4 ("TVA was exempted from the provisions of the [FTCA] at its own request on the ground that it was already subject to suit and certain of the procedural aspects of the Act would be burdensome. The Act was passed after the decision in the Grant case and it must be presumed that TVA sought and Congress granted the exemption with that case in mind.").

[15] *See* Pierce v. United States, 314 U.S. 306, 310 (1941)("TVA, although an instrumentality of the Federal Government, is a corporate entity, separate and distinct from the Federal Government itself."); Stevens v. TVA, 712 F.2d 1047, 1051 (6th Cir. 1983) ("suits against the TVA are not suits against the United States.").

[16] *See* TVA v. EPA, 278 F.3d 1184 (11th Cir. 2002); Big Rivers Elec. Corp. v. EPA, 523 F.2d 16 (6th Cir. 1975); TVA v. United States, 13 Cl. Ct. 692 (Cl. Ct. 1987); TVA v. United States, 96 F. Supp. 409 (N.D. Ala. 1951).

real property for certain purposes.[17] "From its inception, TVA has enjoyed an independence possessed by perhaps no other federal agency. TVA's independence is underscored by its corporate form, its maintenance of a separate legal staff, its removal from centralized control in Washington, its discretionary ratemaking authority, and its exemption from at least 16 provisions of the Administrative Procedures Act." TVA v. EPA, 278 F.3d 1184, 1192 (11th Cir. 2002). "The TVA is run by a Board of Directors, TVA's employees are not subject to the federal Civil Service laws, the TVA's purchasing activities are independent of general federal procurement laws, the TVA's financing bonds are not obligations of the U.S, and the TVA currently receives no congressional appropriations for its activities. Congress has repeatedly acknowledged the TVA's unique nature by, for example, precluding suit in the Court of Federal Claims against TVA, and exempting the TVA from the FTCA. The TVA is a corporate entity, separate and distinct from the Federal Government itself." Pierce v. U.S., 314 U.S. 306, 310 (1941). Since TVA is not the United States, it does not benefit from any immunity that only inures to the United States.

Further, as a maritime law may be in issue in this case, and since the TVA may be sued in its own corporate name, it is not subject to the Public Vessels Act[18] or the Admiralty Jurisdiction Extension Act[19] because those sections only apply to

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[17] *See* 16 U.S.C. §§ 831c(h), (k); United States ex rel. TVA v. Welsh, 327 U.S. 546 (1946).

[18] 46 U.S.C. § 31101.

[19] 46 U.S.C. § 30101.

actions against the U.S. TVA is also not subject to the Suits in Admiralty Act[20] because that section only applies when the judgment would have to be paid directly or indirectly out of the U.S. treasury, or where the U.S. is a party.[21] The vast majority of TVA revenues are kept by the TVA to support its further corporate enterprises, and it is only required to pay a portion of its revenues to the U.S. Treasury In fact, in eminent domain actions, TVA purchases land with its own funds, and not with funds of the U.S. Treasury. Thus, any judgment against the TVA is not paid out of U.S. Treasury funds.

II. SINCE TVA'S COMMERCIAL ACTIVITIES ARE NOT IMMUNE, GAUBERT ANALYSIS DOES NOT APPLY.

TVA asserts that its actions on the day in question should be analyzed under the two part test for the discretionary function exception in United States v. Gaubert, 499 U.S. 315, 324-25 (1991). However, as discussed above, the issue here is not whether the action was mandatory, discretionary, or susceptible to policy analysis. The Gaubert test only applies to government employees; it does not apply to the actions of a federally chartered corporation which is performing non-governmental activities. Here, the issue is to be determined by the test in Loeffler v. Frank, 486 U.S. 549 (1988):

> [W]hen Congress establishes [a sue and be sued] agency, authorizes it to engage in commercial and business

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[20] 46 U.S.C. § 30901.

[21] *See* Johnson v. U.S. Shipping Board Emergency Fleet Corp., 280 U.S. 320, 326 (1930).

> transactions with the public, and permits it to 'sue and be sued,' it cannot be lightly assumed that restrictions on that authority are to be implied. Rather if the general authority to 'sue and be sued' is to be delimited by implied exceptions, it must be clearly shown that [(1)] certain types of suits are not consistent with the statutory or constitutional scheme, [(2)] that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or [(3)] that for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense. In the absence of such showing, it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue or be sued,' that agency is not less amenable to judicial process than a private enterprise under like circumstances would be.

Id. at 554-55.

As Congressional intent and applicable case law clearly show, the conduct by TVA in this case was: 1) Entirely commercial and appurtenant to those commercial activities; 2) Not inconsistent with any statutory scheme; 3) Is not necessary to avoid grave interference with the performance of a governmental function; and 4) the "Sue and be Sued" clause is not to be used in a narrow sense, as

evidenced by TVA's exclusion from multiple immunity statutes and status as a unique and independent entity separate from the U.S. Therefore, Gaubert has no bearing on the issues before this Court.

III. TVA IS NOT PROTECTED BY DISCRETIONARY IMMUNITY BECAUSE ITS ACTIONS WERE NOT DISCRETIONARY.

Even if, *arguendo,* TVA may assert discretionary immunity for its wholly commercial actions in this case, those actions are not protected by the discretionary immunity exception because the failure to exercise reasonable care in the assembly and installation of the power lines across the Tennessee River contained no discretion whatsoever. The Supreme Court's decision in United States v. Gaubert, 499 U.S. 315 (1991) established a two-part test for determining whether challenged governmental conduct falls within the scope of the discretionary function exception, and insulates the governmental agency from liability. The Eleventh Circuit has described the two prongs of the Gaubert Test as follows:

> We must first determine whether the challenged act or omission violated a mandatory regulation or policy that allowed no judgment or choice. United States v. Gaubert, 499 U.S. 315 (1991). "The requirement of judgment or choice is not satisfied if a 'federal statute, regulation, or policy specifically prescribes a course of action for an

> employee to follow, because 'the employee had no rightful option but to adhere to the directive.'" Id. at 322, (*quoting* Berkovitz v. United States, 486 U.S. 531, 536 (1988)). [E]ven assuming the challenged conduct involves an element of judgment, however, we then must determine if the challenged actions are the kind of conduct "that the discretionary function exception was designed to shield." Id. (*quoting* Berkovitz, 486 U.S. at 536); *see also* Phillips v. United States, 956 F.2d 1071, 1075 (11th Cir. 1992). The conduct must be "grounded in the policy of the regulatory regime." Gaubert, 499 U.S. at 325. In Gaubert, the Court discussed the type of conduct that would be considered grounded in judgment or choice but not in developing or carrying out public policy. If a governmental official drove an automobile on a mission connected with his official duties and negligently collided with another car, the exception would not apply. Although driving requires the constant exercise of discretion, the official's decision in exercising that discretion can hardly be said to be grounded in regulatory policy. Id. at 325 n. 7.

Autery v. United States, 992 F.2d 1523, 1526-27 (11th Cir. 1993). TVA makes a factual attack on the existence of subject matter jurisdiction and claims Plaintiffs can assert no set of facts which would

overcome TVA's discretionary function immunity. While the Thackers dispute that TVA has any such immunity for its actions in this case, discretionary immunity does not inure to TVA because its negligent and/or wanton installation of the power lines contained no discretion.

TVA states Plaintiffs have asserted six (6) different types of conduct which are being complained of herein and that all such allegations are protected by discretionary immunity. *See* Doc. 12, at p. 4. However, TVA skips over the averments in the Complaint wherein Plaintiffs allege, "TVA owed a duty to exercise reasonable care in the assembly and installation of the power lines across the Tennessee River." *See* Compl., Doc. 124 and 28. The choice to install the power lines may have been discretionary, but the actual installation of those power lines contained no discretion. In Bobo v. AGCO Corp., 981 F. Supp. 2d 1130, 1145 (N.D. Ala. 2013) and Bobo v. TVA, 2015 U.S. Dist. LEXIS 130741 (N.D. Ala. 2015), TVA was protected by discretionary immunity for its choice in not warning the spouse of its employee about possible asbestos exposure, but it was liable for actually exposing her because those actions contained no discretion. Here, no discretion was involved in the installation of the power lines, and TVA is not protected for those actions by any discretionary immunity.

TVA also asserts that its actions in warning boaters are also protected by discretionary immunity. In support of that averment, TVA makes bare allegations that it is unaware of any mandatory Federal statute, regulation, or policy governing its conduct and provides the affidavit of one of its

employees. The determination of whether those actions were mandatory, discretionary, or are of a type that should be protected by any alleged immunity must be made, and neither the Thackers nor this Honorable Court have had an opportunity to conduct any fact analysis because no discovery has yet been performed. All that is before this Court at this time is the bare allegations of TVA and the affidavit of a single employee. Plaintiffs should be allowed to conduct discovery with TVA to determine whether TVA's actions after it created the hazardous situation may have been mandatory under a Federal statute, regulation, or policy, especially considering TVA formerly had a large patrol division which was charged with patrolling boat traffic on the Tennessee River. A policy governing the actions of that patrol division may have still been in effect on the day in question and may have required certain actions by TVA employees.

In either event, TVA's actions in not exercising reasonable care in installing the power lines was a direct and proximate cause of Plaintiffs' injuries and damages and is not protected by any discretionary immunity. This Honorable Court undoubtedly has subject matter jurisdiction over Plaintiffs' claims.

CONCLUSION

The TVA Act's "Sue and be Sued" clause constitutes a broad waiver of sovereign immunity. Discretionary immunity only applies to governmental functions, and TVA's power generating activities are not a governmental function. TVA's actions which caused Plaintiffs'

injuries and damages were solely commercial functions, which are not protected by sovereign immunity. Even if TVA's actions were governmental, they are not protected by the discretionary exception because no discretion was involved. Therefore, this Honorable Court has subject matter jurisdiction and TVA's Motion to Dismiss should be denied.

PLAINTIFFS RESPECTFULLY REQUEST ORAL ARGUMENT.

Respectfully submitted, this the 29th day of March, 2016.

/s/ Gary V. Conchin
Gary V. Conchin
Attorney for Plaintiffs

/s/ Kenneth B. Cole, Jr.
Kenneth B. Cole, Jr.
Attorney for Plaintiffs

/s/ Taylor Rouse
Taylor Rouse
Attorney for Plaintiffs

OF COUNSEL:

CONCHIN, CLOUD & COLE, LLC
2404 Commerce Court, SW
Huntsville, AL 35801
Phone: (256) 705-7777
Fax: (256) 705-7778
Email: gary@conchincloudcole.com
Email: kenny@conchincloudcole.com
Email: taylor@conchincloudcole.com

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I certify that the foregoing document was filed electronically through the Court's ECF system on the date shown in the document's ECF footer. Notice of this filing will be sent by operation of the Court's ECF system to counsel for all other parties as indicated on the electronic filing receipt and listed below. Parties may access this filing through the Court's ECF system.

Edwin W. Small, Deputy General Counsel
James S. Chase, Senior Attorney
David D. Ayliffe, Senior Attorney
TVA GENERAL COUNSEL'S OFFICE
400 West Summit Hill Drive
Knoxville, Tennessee 37902-1401
Telephone 865.632.4239

/s/ Taylor Rouse
Taylor Rouse
Attorney for Plaintiffs

[ENTERED: April 1, 2016]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

GARY THACKER, ET UX.,

Plaintiffs,

v. No. 5:15-cv-01232-AKK

TENNESSEE VALLEY AUTHORITY,

Defendant.

REPLY BRIEF IN FURTHER SUPPORT OF TVA'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION BASED ON THE DISCRETIONARY FUNCTION EXCEPTION

Edwin W. Small, Deputy General Counsel
James S. Chase, Senior Attorney
David D. Ayliffe, Senior Attorney
TVA GENERAL COUNSEL'S OFFICE
400 West Summit Hill Drive
Knoxville, Tennessee 37902-1401
Telephone 865.632.4239

Attorneys for Tennessee Valley Authority

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INTRODUCTION

TVA has moved the Court to dismiss this action for lack of subject matter jurisdiction based on the discretionary function exception. (Doc. 11.) Plaintiffs' brief in opposition (Doc. 17) argues (1) that the TVA Act's sue-and-be-sued clause is a total waiver of sovereign immunity precluding application of the discretionary function exception to TVA; (2) that the discretionary function exception is not applicable because TVA's power program activities are "commercial"; and (3) that TVA's alleged conduct

was not discretionary. The first two arguments are contrary to Eleventh Circuit precedent and recent rulings of this Court, and the third argument is unavailing because Plaintiffs have not identified any mandatory directive that dictated a specific course of conduct allegedly violated by TVA.

ARGUMENT

I. The TVA Act's Waiver of Sovereign Immunity Does Not Negate TVA's Entitlement to the Discretionary Function Exception.

Plaintiffs cite *FHA v. Burr*, 309 U.S. 242, 245 (1940); *Loeffler v. Frank*, 486 U.S. 549, 556 (1988), and *FDIC v. Meyer*, 510 U.S. 471, 480 (1994), to suggest that TVA's sue-and-be-sued clause makes TVA's legal liability identical to that of private entities unless TVA "can make a 'clear showing' that 'an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function." (Doc. 17 at 7.) Plaintiffs are wrong for the reasons raised in TVA's initial brief (Doc. 12 at 6-9), and because Plaintiffs' arguments conflict with controlling Supreme Court and Eleventh Circuit authority.

In *Peoples National Bank of Huntsville, Ala. v. Meredith*, 812 F.2d 682, 684-85 (11th Cir. 1987), the Eleventh Circuit recognized that TVA's sue-and-be-sued clause is a broad waiver of sovereign immunity but nevertheless held that TVA cannot be held liable "when the subject governmental function is discretionary":

> First, we note that the doctrine of sovereign immunity does not bar suit against TVA; indeed, its enabling act provides that it "[m]ay sue and be sued in its corporate name." 16 U.S.C. § 831(c)(b). Nevertheless, courts have held that TVA cannot be subject to liability when engaged in certain governmental functions. ***Queen*** *v.* ***Tennessee Valley Authority***, 689 F.2d 80, 85 (6th Cir. 1982). This "nonliability" doctrine is applied when the subject governmental function is discretionary. ***Morris*** *v.* ***Tennessee Valley Authority***, 345 F. Supp. 321 (N.D. Ala.1972).

The Eleventh Circuit's holding in *Peoples* is in accord with long-standing principles regarding sue-and-be-sued clauses. Indeed, the law has been settled since ***FHA*** *v.* ***Burr*** that sue-and-be-sued clauses in enabling acts of Federal agencies are presumed to be broad waivers of sovereign immunity which include the appropriate incidents of legal proceedings, except where it appears

> that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the "sue and be sued" clause in a narrow sense.

Burr, 309 U.S. at 245. *Loeffler* and *Meyer*, the Supreme Court cases cited in Plaintiffs' brief, quote this language from *Burr*.

As reflected in the above language from *Burr* and repeated in *Loeffler* and *Meyer*, the scope of a Federal agency's sue-and-be-sued waiver with respect to a specific incident of suit is not a matter susceptible to textual parsing; rather, it is a matter to be resolved by legal policy analysis because "the scope of such a waiver can only be ascertained by reference to underlying congressional policy." *Franchise Tax Bd. v. USPS*, 467 U.S. 512, 521 (1984).

Applying this rationale, *Loeffler* held that the sue-and-be-sued clause in the Postal Service's enabling statute exposed it to awards for prejudgment interest in cases arising under Title VII because such awards are "natural and appropriate incidents" of litigation. 486 U.S. at 555. In *Myers*, the Court held that the FDIC's sue-and-be-sued clause did not bar a potential tort claim for an alleged constitutional violation against the FDIC but nonetheless refused to recognize such a claim against Federal agencies as a matter of policy. 510 U.S. at 480-86.

In contrast to the matters at issue in *Loeffler* and *Myers*, the discretionary function exception arises from constitutional separation of powers principles and is implied even when there is a broad waiver of sovereign immunity. For example, while the Federal Tort Claims Act (FTCA) contains an explicit discretionary function exception, the Supreme Court has recognized that the FTCA's statutory exception merely makes explicit what

otherwise would have been accomplished through judicial construction. The legislative history is clear that the exception was drafted merely as a "clarifying amendment" (*Dalehite v. United States*, 346 U.S. 15, 26 (1953)), because, under constitutional separation of powers principles, it was "believed that claims of the kind embraced by the discretionary function exception would have been exempted from the waiver of sovereign immunity by judicial construction." *United States v. Varig Airlines*, 467 U.S. 797, 810 (1984).

Based on separation of powers principles, the majority of courts, including the Eleventh Circuit, have recognized a discretionary function exception to the broad waiver of sovereign immunity in the Suits in Admiralty Act (SAA) even though there is no express discretionary function exception in the SAA. As stated in *Mid-South Holding Co. v. United States*, 225 F.3d 1201, 1204 (11th Cir. 2000):

> [T]his circuit is among the majority holding that the SAA's waiver of immunity is subject to the discretionary function exception. *See Williams v. United States*, 747 F.2d 700, 700 (11th Cir. 1984), *aff'g and adopting Williams By and Through Sharpley v. United States*, 581 F. Supp. 847 (S.D. Ga. 1983).

In affirming the district court, the Eleventh Circuit pointed out that the SAA was passed after the Government "entered the merchant shipping field" and the purpose was to provide relief to persons injured by wrongful conduct of the Government "when acting as a shipper" (i.e., an

activity with a private ***commercial*** analog). *Id.* at 849-50. Like TVA's sue-and-be-sued clause, the SAA's waiver of immunity is, on its face, without limitation. Thus, the SAA provides for injury and death suits in admiralty "against the United States or a [wholly] federally-owned corporation" in cases "in which, if [the Government] vessel were privately owned or operated . . . a civil action in admiralty could be maintained." 46 U.S.C. § 30903(a). The SAA further provides that "[a] civil action under this chapter ***shall proceed and be heard and determined according to the principles of law . . . applicable in like cases between private parties.***" 46 U.S.C. § 30907.

As noted by the district court in *Williams*, the SAA's waiver language establishes that "Congress intended the new SAA to be a waiver of ***all*** governmental immunity to suits in admiralty." 581 F. Supp. at 851. Nevertheless, the Eleventh Circuit found that separation of powers principles mandate that "the SAA's waiver of immunity is subject to the discretionary function exception." *Mid-South Holding Co.*, 225 F.3d at 1204.

There is no basis for distinguishing between the breadth of the SAA's waiver of immunity and the waiver in the TVA Act's sue-and-be-sued clause; under separation of powers principles, both of those broad waivers are subject to the discretionary function exception. Thus, the decisions of the Eleventh and Sixth Circuits and the decisions of district courts in those circuits holding the discretionary function exception applicable to TVA are based on sound and well- established legal reasoning grounded in separation of powers principles.

II. There is No Commercial Versus Governmental Distinction under Federal Discretionary Function Law.

Plaintiffs next argue that even if the discretionary function exception were applicable to TVA, it is not applicable to challenged conduct involving TVA's power program activities because they are "commercial" rather than "governmental" in nature. (Doc. 17 at 2-3.) Again, Plaintiffs are wrong.

A Federal agency engaged in activities to further Federal goals and purposes pursuant to its enabling statue does not become non-governmental simply because non-governmental entities engage in similar activities for private goals and purposes.[1] Indeed, The Supreme Court consistently has held that, if activities of Federal agencies are statutorily authorized and constitutional, they necessarily are governmental and cannot be parsed into other categories such as proprietary or commercial.[2] And this is true even as to sue-and-be-sued agencies involved in activities which have private commercial

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[1] "The federal government has played an active role in providing electrical energy." *Citizens & Landowners Against the Miles City/New Underwood Powerline v. Sec'y, U.S. Dep't of Energy*, 683 F.2d 1171, 1180 (8th Cir. 1982) ("Federal agencies, such as WAPA, Bonneville Power Administration, [TVA], and others . . . have been created to implement federal policies and programs aimed at producing and transmitting electrical power.")

[2] TVA's construction and operation of power plants is authorized by the TVA Act and is constitutional. *See, e.g., United States ex rel. TVA v. Three Tracts of Land*, 377 F. Supp. 631, 635 (N.D. Ala. 1974) ("It is the Court's opinion that the construction of a nuclear powered steam plant is authorized by the TVA Act and that the authorization is not in violation of the United States Constitution.").

analogs (e.g., lending activities, insurance activities). Further, the Supreme Court specifically has rejected the addition of a "governmental" versus "commercial" component to the two-part test to determine application of the discretionary function doctrine.

In *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947), the Supreme Court squarely rejected the possibility that the liability of a self-sustaining, sue-and-be-sued Federal corporate agency can be governed by a "governmental" versus "commercial" distinction. The Federal Crop Insurance Corporation (FCIC) was created as a sue-and-be-sued corporate agency for the purpose of selling crop insurance on a self-sustaining basis, with any impairment of the Government's initial capitalization of the FCIC to be restored out of operating profits of the FCIC.

The issue in *Merrill* was the FCIC's common law liability based on an insurance contract issued by an agent having apparent but not actual authority. The Idaho Supreme Court affirmed the trial court's judgment against the FCIC, reasoning that since the FCIC was a sue-and-be-sued Federal corporate agency, its liability should be determined as though it were a private commercial insurer subject to the common law doctrine of apparent authority. The United States Supreme Court reversed, holding that the FCIC could ***not*** be held liable just like a private entity in the insurance business:

> [W]e assume that recovery could be had against a private insurance company. But the Corporation is not a private insurance company. ***It is too late in***

> ***the day to urge that the Government is just another private litigant, for purposes of charging it with liability, whenever it takes over a business theretofore conducted by private enterprise or engages in competition with private ventures.*** Government is not partly public or partly private, depending upon the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it. [332 U.S. at 383-84 (internal footnotes omitted.).]

Supreme Court holdings involving sue-and-be-sued Federal agencies involved in lending activities are in full accord. For example, in *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 477 (1939), the Court stated:

> ***[W]hen the national government lawfully acts through a corporation which it owns and controls, those activities are governmental functions . . . .***

Similarly, in *Pittman v. Home Owners' Loan Corp.*, 308 U.S. 21, 32 (1939), the Court reiterated:

> ***[T]he activities of the Corporation through which the national government lawfully acts must be regarded as governmental functions . . . .***

And in *Fed. Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 102 (1941), the Court again held:

> The argument that the lending functions of the federal land banks are proprietary rather than governmental misconceives the nature of the federal government with respect to every function which it performs. ***The federal government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental.*** It also follows that when Congress constitutionally creates a corporation through which the federal government lawfully acts, the activities of such corporation are governmental. [Internal citation omitted.]

In *Fed. Land Bank v. Bd. of County Comm'rs*, 368 U.S. 146, 150-51 (1961), the Supreme Court summarized its prior holdings:

> ***Legitimate activities of governments are sometimes classified as "governmental" or "proprietary"; however, our decisions have made it clear that the Federal Government performs no "proprietary" functions. If the enabling Act is constitutional and if the instrumentality's activity is within the authority granted by the Act, a governmental function is being performed***. [Internal footnotes omitted.]

In accord with the above holdings, the Supreme Court specifically has rejected the addition of a "governmental" versus "commercial" component to the two-part test to determine application of the discretionary function exception. In the leading case of *Dalehite v. United States*, 346 U.S. 15 (1953), the alleged Government negligence involved conduct with a common commercial analog—the manufacture and shipping of fertilizer. Nevertheless, the Supreme Court held the discretionary function exception applicable, rejecting a dissent argument that the discretionary function exception should be held inapplicable because the challenged conduct "involved actions akin to those of a private manufacturer, contractor, or shipper." *Id.* at 60.

Subsequent Supreme Court decisions in tort cases have reaffirmed the point. *See Indian Towing Co. v. United States*, 350 U.S. 61, 65 (1955) (refusing to adopt such a distinction because "it would thus push the courts into the 'non- governmental' – 'governmental' quagmire that has long plagued the law of municipal corporations" and declaring the distinction to be "a rule of law that is inherently unsound"); *Varig Airlines*, 467 U.S. at 812 (reaffirming *Indian Towing's* refusal to be drawn into the governmental versus non-governmental "quagmire" for purposes of determining the Government's tort liability).[3]

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[3] Courts have not excluded electric power programs of other Federal agencies from application of the discretionary function exception on a commercial versus governmental theory. Rather, as long as the two-part discretionary function test is satisfied, courts apply the discretionary function exception to challenged conduct involving the power programs

Plaintiffs here ignore this longstanding Supreme Court precedent and, instead rely on decisions from the Fourth Circuit, *North Carolina ex rel. Cooper v. TVA*, 515 F.3d 344 (4th Cir. 2008), and the Second Circuit, *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2nd Cir. 2009), both of which fail to address the Supreme Court's rejection of the artificial "governmental" versus "commercial" distinction. Thus, Plaintiffs' reliance on these decisions is misplaced.

In *North Carolina*, a divided Fourth Circuit panel held that the discretionary function exception was not available to TVA in a tort case involving emissions from certain of the Government's fossil plants entrusted to TVA, stating that "TVA's power-generating activities are commercial in nature and thus are not immune to suit."[4] 515 F.3d 350 n.4. The Fourth Circuit panel majority offered no legal logic

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of other Federal agencies. *E.g., Richardson v. U.S.*, 943 F.2d 1107 (9th Cir. 1991) (discretionary function exception applicable to preclude personal injury claims based on the alleged negligent design of a Bonneville Power Administration electric power transmission line); *Mitchell v. U.S.*,787 F.2d 466 (9th Cir. 1986); *Mellott v. U.S.*, 808 F. Supp. 746 (D. Mont. 1992) (discretionary function exception applicable to preclude a wrongful death claim based on the alleged negligent design of a Western Area Power Administration electric power transmission line).

[4] The dissenting member of that panel would have held the discretionary function exception applicable to TVA. 515 F.3d 354. The *North Carolina* split panel decision on interlocutory appeal did not receive any further review in the Fourth Circuit or the Supreme Court because the case was dismissed on other grounds. *North Carolina v. TVA*, 615 F.3d 291 (4th Cir. 2010).

for ignoring the Supreme Court authorities cited above.[5]

The *North Carolina* holding also is contrary to the Eleventh Circuit's decision in *Johns v. Pettibone Corp.*, 843 F.2d 464 (11th Cir. 1988), where the exception was applied to conduct arising out of TVA's power program activities. *Johns* involved the electrocution death of a contractor employee on the premises of TVA's Widows Creek Fossil Plant. This Court granted summary judgment to the TVA managers named as defendants. The Eleventh Circuit affirmed, holding that "safety decisions [by TVA's coal-fired power plant managers] represent an exercise of discretion giving rise to governmental immunity" and FTCA discretionary function cases were "'appropriate in the context of the TVA defendants.'" *Id.* at 467 n.2 (quoting from and adopting this Court's opinion).

Moreover, the *North Carolina* analysis has been analyzed and rejected by district courts (including this Court) in the Sixth and Eleventh Circuits. In *Mays v. TVA*, 699 F. Supp. 2d 991 (E.D. Tenn. 2010), which involved a large number of tort cases arising from the failure of an ash containment dike at TVA's Kingston Fossil Plant, the court explained:

> The Court respectfully disagrees with Plaintiffs' extension of the holding

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[5] The *Am. Elec. Power* decision also fails to offer any analysis of the controlling Supreme Court authority; instead, it "rel[ies] on the . . . Fourth Circuit's decision[] in *North Carolina*." 582 F.3d 309, 388-89 (2nd Cir. 2009). Therefore, the Second Circuit's decision is not pertinent.

of the Fourth Circuit as it pertains to the facts of these cases, facts involving the failure of a coal ash retainment dike at TVA's KIF plant, a coal-fired electricity plant. As an initial matter, the Court notes that the holding of *North Carolina* is contrary to previous decisions by the Sixth Circuit affirming the application of the discretionary function doctrine to TVA when the challenged conduct relates to the operation of dams, flood control, and electric power production. In addition, this Court will not parse the conduct or activities of TVA into the distinct categories of commercial and governmental conduct because the application of such distinct categories are bound to lead to disparate and inconsistent results. This is especially so when, as here, the challenged conduct and activities are in furtherance of a function that TVA is explicitly authorized to perform by the TVA Act-namely, electric power production and distribution.

. . . Congress made the governmental choice of authorizing TVA to provide communities with various types of electric power. Such conduct in a federally created agency and instrumentality—the exercise of a statutorily authorized purpose—constitutes the exercise of a "governmental function" to which the discretionary function doctrine applies.

> Accordingly, the Court will apply the discretionary function doctrine to TVA and its conduct relating to its power production purpose and function, thus encompassing the challenged conduct in these cases. [*Id.* at 1008-10 (internal citations and footnotes omitted).]

In *Bobo v. AGCO Corp.*, 981 F. Supp. 2d 1130 (N.D. Ala. 2013), which involved bystander asbestos exposure claims by the spouse of a worker at TVA's Browns Ferry Nuclear Plant, this Court similarly rejected the commercial versus governmental distinction as unsound:

> Primarily, the Fourth Circuit's holding in *North Carolina* is contrary to the Eleventh Circuit's binding decision in *Johns v. Pettibone*, which upheld the application of the discretionary function doctrine to TVA's power-production activities — albeit in connection with the operation of a coal-fired power plant, as contrasted to a nuclear facility: a distinction that this court does not believe should work a difference in the decision. Further, as the Eastern District of Tennessee stated in a persuasive opinion [*Mays v. TVA*], this Court will not parse the conduct or activities of TVA into the distinct categories of commercial and governmental conduct because the application of such distinct categories are bound to lead to disparate and inconsistent results. This is especially

> so when, as here, the challenged conduct and activities are in furtherance of a function that TVA is explicitly authorized to perform by the TVA Act — namely, electric power production and distribution.
>
> Thus, because Congress authorized TVA to "produce, distribute, and sell electric power," this court finds that such conduct constitutes a governmental function to which the discretionary function doctrine may apply.

981 F. Supp. 2d at 1146 (internal citations omitted).

Plaintiffs cite five TVA cases in support of their commercial versus governmental assertion (Doc. 17 at 8, 9 n.10), but the actual ***holdings*** of those cases do not support Plaintiffs argument.[6]

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[6] *Grant v. TVA*, 49 F. Supp. 564 (E.D. Tenn. 1942), involved crop damage caused by flood waters and the third claim of the complaint alleged the flooding resulted from TVA's accumulation of waters to generate electricity. The court held that "***assuming*** that there is a right to sue on the third claim because it concerns the defendant's commercial activities, it is my judgment that [TVA's] motion for summary judgment on this claim should be sustained. . . . [T]here is no material evidence to be submitted to a jury on the third claim." *Id.* at 566. Further, *Grant* was decided prior to the Supreme Court's decision in *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947), which rejects the illogic of the *Grant* dicta.

Smith v. TVA, 436 F. Supp. 151 (E.D. Tenn. 1977), involved blasting damages resulting from construction of a hydroelectric generating plant. The court held that plaintiff's strict liability and continuing trespass counts were

In contrast, many courts in cases arising out of TVA's power program activities have stated that TVA is wholly governmental in nature. *See, e.g.*,

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maintainable (since TVA is subject to suit), but that plaintiff's nuisance count was not: "Since the TVA project here involved is being constructed under legislative authority, the construction of the project would not constitute a nuisance. Therefore, the continuing nuisance count will be dismissed." *Id.* at 154.

Brewer v. Sheco Constr. Co., 327 F. Supp. 1017 (W.D. Ky. 1971), involved blasting damages resulting from electrical substation construction. ***The court stated that "[e]ven though several cases attempt to distinguish between governmental and proprietary type functions, this court believes that it is not necessary to define such a dichotomy*** in this case, but only necessary to state that the T.V.A. is not immune from a suit of this nature [strict liability], nor is such a suit contrary to public policy." *Id.* at 1019 (internal citation omitted). The case did not involve the discretionary function exception.

Latch v. TVA, 312 F. Supp. 1069 (N.D. Miss. 1970), was an electrocution case in which the issue was the proper basis of jurisdiction. In the process of finding jurisdiction, the court stated that TVA's sue-and-be-sued clause "relinquished any sovereign immunity which TVA might have had as a government agency or corporation for proprietary functions . . . ." *Id.* at 1072. *Latch* did not consider whether the discretionary function exception might be applicable; it simply stands for the point that TVA is amenable to suit in tort.

Adams v. TVA, 254 F. Supp. 78 (E.D. Tenn. 1966), involved blasting damages resulting from steam plant construction. This Court did ***not*** hold that the discretionary function exception was inapplicable because power program activities were involved; rather, ***the Court considered*** the discretionary function exception on its merits and held that "the determination as to the amount of explosives to use in the excavations for the Bull Run plant was not the kind of judgment protected by *Dalehite v. United States*." *Id.* at 80.

Quality Tech. Co. v. Stone & Webster Eng'g, 745 F. Supp. 1331, 1339 (E.D. Tenn. 1989) ("As has been declared by many courts, the TVA is a federal government corporation — 'an agency performing wholly governmental services, and is an instrumentality of the United States.'"), *aff'd*, 909 F.2d 1484 (6th Cir. 1990); *PRI Pipe Supports v. TVA*, 494 F. Supp. 974, 975 (N.D. Miss. 1980) ("TVA is an agency performing wholly governmental services. . .").

In addition to *Johns*, *Bobo*, and *Mays*, there are a number of other decisions holding the discretionary function exception applicable to cases arising out of TVA's power program activities. *See Hill v. TVA*, 842 F. Supp. 1413, 1420 (N.D. Ala. 1993) (dismissing claims arising out of TVA's operation and management of Browns Ferry because "[w]hen TVA is engaged in a governmental function that is discretionary in nature, where the United States itself would not be liable, TVA cannot be subject to liability"); *Edwards v. TVA*, 255 F.3d 318, 320 (6th Cir. 2001) (holding that discretionary function exception applied to preclude liability for dangers "created by the discharge of water through . . . hydroelectric turbines" to generate electricity); *Queen v. TVA*, 689 F.2d 80, 84-85 (6th Cir. 1982) (holding that TVA's alleged defamation of an alleged electricity-saving device being marketed in the Tennessee Valley region involved a discretionary governmental function; the alleged motive of TVA was that widespread use of the device would reduce TVA's electric revenues).

Thus, a number of decisions of this Court and the Eleventh Circuit hold that the discretionary

function exception is applicable to TVA. For example, in holding TVA immune from allegations of promissory fraud, this Court stated in *North Alabama Electric Coop. v. TVA*, 862 F. Supp. 2d 1291, 1301 (N.D. Ala. 2012):

> Although TVA generally is subject to suit, "courts have held that TVA cannot be subject to liability when engaged in certain governmental functions." *Peoples National Bank of Huntsville, Alabama v. Meredith*, 812 F.2d 682, 685 (11th Cir. 1987) (citations omitted). That so-called "nonliability" doctrine applies to discretionary governmental functions. *Id.*

Likewise, in *Dickerson* v. *TVA*, No. CV94-B-1031-NW, Mem. Op. at 10 n.6 (N.D. Ala. Jan. 31, 1995), in holding the discretionary function exception applicable to preclude personal injury claims arising out of TVA's alleged negligent maintenance of the roadway over Wheeler Dam, the Court stated:

> The principle of nonliability for discretionary functions has been held to apply to tort suits filed against TVA, in the same manner as it applies to tort suits involving other government agencies by virtue of the discretionary function exception, 28 U.S.C. § 2680(a) (1988), to the Federal Tort Claims Act. *E.g., Peoples Nat'l Bank v. Meredith*, 812 F.2d 682, 684-85 (11th Cir. 1987);

Queen v. TVA, 689 F.2d 80, 86 (6th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983); *Morris v. TVA*, 345 F. Supp. 321 (N.D. Ala. 1972).

III. Plaintiffs Have Not Identified Any Mandatory Federal Statute, Regulation Or Policy Which Dictated a Specific Course of Action.

Plaintiffs do not contest that they have the burden of proving subject matter jurisdiction and that they must show that the challenged TVA conduct violated a mandatory Federal statute, regulation, or policy which dictated a specific course of action. Plaintiffs have not satisfied their burden for the simple reason that they have not identified any mandatory directive relating to TVA's alleged conduct.

Plaintiffs' suggestion that jurisdiction exists because the Complaint alleges that TVA breached a duty of care in the assembly and installation of the power lines across the Tennessee River (Doc. 17 at 21) is unavailing for the same reason; Plaintiffs have not identified any mandatory directive which dictated a specific course of action that TVA is alleged to have violated.

CONCLUSION

For the reasons stated and upon the authorities cited, the Court should dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(1).

Respectfully submitted,

s/James S. Chase

Edwin W. Small, Deputy General Counsel
James S. Chase, Senior Attorney
David D. Ayliffe, Senior Attorney
TVA GENERAL COUNSEL'S OFFICE
400 West Summit Hill Drive
Knoxville, Tennessee 37902-1401

Attorneys for Tennessee Valley Authority

CERTIFICATE OF SERVICE

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Gary V. Conchin, Esq.
Kenneth B. Cole, Esq.
Taylor Rouse, Esq.
Conchin, Cloud & Cole, LLC
2404 Commerce Court, SW
Huntsville, Alabama
Phone (256) 384-7777
gary@conchincloudcole.com
kenny@conchincloudcole.com
taylor@conchincloudcole.com

s/James S. Chase
Attorney for Tennessee Valley Authority

No. 17-1201

In The Supreme Court of the United States

GARY THACKER and VENIDA L. THACKER,
Petitioners,

v.

TENNESSEE VALLEY AUTHORITY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR PETITIONERS

Franklin Taylor Rouse
Counsel of Record
Craig N. Rosler
Kenneth Bridges Cole, Jr.
Gary Vestal Conchin
CONCHIN, CLOUD & COLE, LLC
2404 Commerce Court, S.W.
Huntsville, Alabama 35801
(256) 705-7777
taylor@conchincloudcole.com

Counsel for Petitioners

Dated: November 13, 2018

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QUESTION PRESENTED

This Court tests the immunity of governmental "sue and be sued" entities (like the Tennessee Valley Authority) under *Fed. Housing Amin. v. Burr*, 309 U.S. 242 (1940). The Court has declined to borrow rules from the Federal Tort Claims Act (FTCA) to narrow that immunity. *FDIC v. Meyer*, 510 U.S. 471 (1994). Did the Eleventh Circuit err by using an FTCA-derived "discretionary-function exception," rather than *Burr*, to immunize the TVA from the plaintiffs' claims?

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OPINIONS BELOW

The opinion of the Eleventh Circuit is reported at 868 F.3d 979 (11th Cir. 2017). The decision of the district court is reported at 188 F. Supp. 3d 1243 (N.D. Ala. 2015). These decisions appear in the Appendix to the petition for writ of *certiorari* at 1a–16a.

JURISDICTION

This Court has subject-matter jurisdiction of this suit under Article III, Section 2 of the U.S. Constitution and under 28 U.S.C. § 1254(1). The Eleventh Circuit's decision was entered on August 22, 2017. (Pet. App. 1a, 10a–11a). That court denied the plaintiffs' timely petition for a panel rehearing on November 28, 2017. (Pet. App. 17a).

STATUTES INVOLVED

The following statutes, due to their length, are set out in the Appendix to the petition for writ of certiorari at 18a–37a. Sup. Ct. R. 14(f), (i)(v).

16 U.S.C. § 831c (Pet. App. 18a–23a).

28 U.S.C. § 1346 (Pet. App. 24a–27a).

28 U.S.C. § 2679 (Pet. App. 28a–33a).

28 U.S.C. § 2680 (Pet. App. 34a–37a).

STATEMENT OF THE CASE

This appeal seeks the reversal of an Eleventh Circuit decision concerning the immunity of the Tennessee Valley Authority (TVA). The underlying suit is a personal-injury action against the defendant TVA. The district court thus had subject-matter jurisdiction of this suit under 28 U.S.C. § 1331. *E.g.*, *Jackson v. TVA*, 462 F. Supp. 45, 50 (M.D. Tenn. 1978) (suits against TVA come within federal-question jurisdiction) (citing *Pac. R.R. Removal Cases*, 115 U.S. 1 (1885) (claims against entities incorporated by Act of Congress fall within general federal-question jurisdiction)).

1. Facts — A Tragic Accident on the Tennessee River

The Eleventh Circuit concisely and accurately recounted the facts giving rise to the Thackers' claims:

> Gary and Venida Thacker sued the [TVA] . . . for its alleged negligence involving a tragic accident on the Tennessee River. On July 30, 2013, while Gary Thacker and his friend Anthony Szozda were participating in a local fishing tournament, TVA was attempting to raise a downed power line that was partially submerged in the river. The power line, which crossed the river, had become lax earlier in the day when a pulling cable failed during a conductor-replacement project. At the same moment that TVA began lifting the

> conductor out of the water, the fishing partners' boat passed through the area at a high rate of speed, and the conductor struck both Thacker and Szozda. As a result, according to the complaint, Thacker suffered serious physical injuries, his wife suffered loss-of-consortium damages, and Szozda was killed instantly.

Thacker v. TVA, 868 F.3d 979, 980 (11th Cir. 2017) (per curiam) (Pet. App. 2a).[1] On these facts, the Thackers claimed that the TVA had not used reasonable care in assembling and installing its power lines, in warning boaters of the hazard it had created, and in responding to the resulting emergency.[2]

2. The District Court's Decision

On the TVA's motion, the district court dismissed the Thackers' case under Rule 12(b)(1) for lack of subject-matter jurisdiction. *Thacker v. TVA*, 188 F. Supp. 3d 1243, 1244–46 (N.D. Ala. 2015) (Pet. App. 12a–16a). More precisely, the district court held that the TVA was immune from this suit under the "discretionary function" rule. *Id.* The TVA had argued

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[1] Throughout this brief, citations in the form "Pet. App. __a" are to the Appendix to the petition for a writ of *certiorari*; that appendix contains the decisions under review and the statutes involved. *See* Sup. Ct. R. 24.1 ("Any . . . items already reproduced in a petition for a writ of certiorari, . . . or any appendix to the foregoing, . . . need not be reproduced again in the joint appendix."). Citations in the form "JA__" are to the Joint Appendix filed in connection with this brief.

[2] *E.g.*, JA 29–31 (Compl. ¶¶ 20–21, 25).

that "because the complaint concerns personal injuries arising out of [its] response to an emergency created during maintenance of its electrical power lines," the district court "lack[ed] subject[-]matter jurisdiction under the discretionary[-]function doctrine." *Id.* at 1244 (Pet. App. 12a–13a).

The district court agreed. Citing the TVA's organic statute — specifically, 16 U.S.C. § 831c(b) (Pet. App. 18a), which a··thorizes the TVA to "sue and be sued in its corporate name" — the district court first allowed that "the TVA does not enjoy sovereign immunity." *Thacker*, 188 F. Supp. 3d at 1245 (Pet. App. 13a). Nonetheless, it reasoned that the TVA "cannot be subject to liability" where it is "engaged in a governmental function that is discretionary in nature." *Id.* (Pet. App. 13a–14a) (quoting *Hill v. TVA*, 842 F. Supp. 1413, 1420 (N.D. Ala. 1993)). The district court then found that the TVA here was engaged in a "response to an emergency" and that such "safety decisions represent an exercise of discretion giving rise to governmental immunity." *Id.* The court granted the TVA's motion and dismissed the case. *Id.* at 1245–46 (Pet. App. 14a–15a).

3. The Intermediate Appeal — Borrowing the FTCA's Discretionary-Function Test

The Eleventh Circuit upheld the dismissal. It, too, held the TVA immune from the Thackers' claims. The appeals court started by discussing the immunity enjoyed, not by the TVA specifically, but by the United States:

> The United States enjoys sovereign immunity from suit unless it

> unequivocally waives it in statutory text. *Lane v. Pena*, 518 U.S. 187, 192 (1996) (citation omitted). When Congress waives sovereign immunity, we must strictly construe that waiver, in terms of its scope, in favor of the United States. *See id.* (citation omitted).

Thacker, 868 F.3d at 981 (Pet. App. 3a). At the same time, the court recognized that, under 16 U.S.C. § 831c(b) (Pet. App. 18a), the TVA is "expressly" authorized to "sue and be sued" in its own name. *Id.* (Pet. App. 4a).

The Eleventh Circuit's analysis then took a decisive turn. The court wrote: "Though 'sue-and-be-sued' waivers are liberally construed," they are "subject to certain exceptions." *Id.* (citing cases). The operative exception, in the Eleventh Circuit's view, was the "discretionary-function exception." *See id.* at 981–82 (Pet. App. 4a). The court explained that it had applied this exception "in cases arising out of TVA's commercial, power-generating activities." *Id.* at 981 (Pet. App. 4a) (citing *Johns v. Pettibone Corp.*, 843 F.2d 464, 466–67 (11th Cir. 1988)). The court expressly borrowed this limitation from the Federal Tort Claims Act (FTCA). *Id.* at 981–82 (Pet. App. 5a–6a). The Eleventh Circuit said that the discretionary-function exception that it applies to the TVA is the "same test" that applies under the FTCA. *Id.* at 982 (Pet. App. 6a). The court then held that the TVA's challenged acts — which it described as the "assembly and installation of power lines" and inadequately "warning boaters . . . of the hazards the TVA [had] created" — "plainly involved public-policy considerations." *Id.* at 982–83 (Pet. App. 6a, 8a). The

acts were thus discretionary. *Id.* (Pet. App. 6a–9a). They fell outside the TVA's sue-and-be-sued clause and could not undergird a claim against the TVA. *Id.* The appeals court thus agreed that the TVA was immune from the Thackers' suit. *Id.* It affirmed the jurisdictional dismissal. *Id.* at 983 (Pet. App. 9a).

The Eleventh Circuit entered its decision on August 22, 2017. (Pet. App. 1a, 10a). The Thackers timely sought a panel rehearing, but, on November 28, 2017, their request was denied. (Pet. App. 17a). The Thackers then sought certiorari review in this Court, which was granted on September 27, 2018.

SUMMARY OF THE ARGUMENT

The Eleventh Circuit applied the wrong legal test — and thus reached the wrong result. Using its own precedent, rather than this Court's, the Eleventh Circuit tested the TVA's sue-and-be-sued immunity under a "discretionary-function" test borrowed from the Federal Tort Claims Act (FTCA). But the FTCA does not apply to the TVA, and no other statute affords the TVA discretionary-function immunity. Nor has this Court's long-established precedent recognized a discretionary-function exception to limit sue-and-be-sued entities' amenability to suit. This Court has instead expressly *declined* to borrow rules from the FTCA to diminish sue-and-be-sued clauses like the one that "broad[ly]" opens the TVA to suit.

The Eleventh Circuit's analysis thus departs from this Court's rules — from both the deeper principles and the overt test, which have been in place since at least 1940 — describing the narrow immunity of federal "sue and be sued" entities. In the end, after

applying the (misplaced) discretionary-function test, the lower courts took what should have been a "broad" and "liberal[]" amenability to suit — and inverted it to yield a nearly impregnable immunity. For, if the TVA cannot be sued for the workaday accident that it caused here, then it is hard to see what it could ever be sued for. Its notionally "broad" suability will have all but vanished.

The Thackers ask the Court to confirm and thus clarify the immunity rules that govern the TVA's sue-and-be-sued liability. To resolve the difference in how the appellate circuits have analyzed the TVA's highly limited immunity. And, ultimately, to hold that — contrary to the lower courts' decisions — the district court does have subject-matter jurisdiction to hear their claims against the TVA.

ARGUMENT

1. The Largely Commercial TVA Is "Broadly" Amenable to Suit

The TVA's organic statute states: "Except as otherwise specifically provided *in this chapter* [the Tennessee Valley Authority Act of 1933], the [TVA] . . . [m]ay sue and be sued in its corporate name." 16 U.S.C. § 831c(b) (Pet. App. 18a) (emphasis added).[3] The TVA Act contains no provision that grants immunity to or limits the liability of the TVA for discretionary decisions. Thus, "[b]y permitting [the TVA] to sue and be sued, Congress effected a 'broad' waiver" of any governmental immunity that the TVA might have otherwise enjoyed." *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (quoting *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992)). This Court has elsewhere put these same points thus:

> By launching "the [TVA] into the commercial world," and including a sue-and-be-sued clause in its charter, Congress has cast off the [TVA]'s "cloak of sovereignty" and given it the "status of a private commercial enterprise." [*Library of Congress* v. *Shaw*, 478 U.S. 310, 317 n. 5 (1986)]. It follows that Congress is presumed to have waived any otherwise existing immunity of the [TVA] . . . .

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[3] No limitation on the TVA's sue-and-be-sued clause, arising from the TVA Act, is involved in this case.

Loeffler v. Frank, 486 U.S. 549, 556 (1988) (discussing the U.S. Postal Service).

This Court has said that the TVA is not the United States; it is "a corporate entity, separate and distinct from the Federal Government itself." *Pierce v. United States*, 314 U.S. 306, 310 (1941). Congress "intend[ed] that [the TVA] shall have much of the essential freedom and elasticity of a private business corporation." *N.C. ex rel. Cooper v. TVA*, 515 F.3d 344, 349 (4th Cir. 2008) (quoting H.R. Rep. No. 73-130 at 19 (1933)). The TVA may be the preeminent example of a governmentally created entity that, over time, has grown into a distinct commercial corporation.[4] Indeed, the TVA "operates in much the same way as an ordinary business corporation, under the control of its directors in Tennessee, and not under that of a cabinet officer or independent agency headquartered in Washington." *Natural Resources Defense Council, Inc. v. TVA*, 459 F.2d 255, 257 (2nd Cir. 1972); *accord, e.g., North Carolina ex rel. Cooper v. TVA*, 439 F. Supp. 2d 486, 490 (W.D.N.C. 2006).

2. The TVA Is Expressly Excluded from the FTCA

The Eleventh Circuit immunized the TVA from the Thackers' claims based on a discretionary-function exception that it borrowed from the FTCA. (Pet. App. 6a). It is therefore worth emphasizing, near

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[4] The TVA has since become the largest public-power company in the nation, supplying electricity to more than 9 million customers in 7 states, and generating nearly $11 billion in annual revenue. *See* TVA Annual 10-K Report 2017 (available at http://www.snl.com/Cache/c3911069 79.html (last accessed Nov. 6, 2018)).

the start of this discussion, that the FTCA does not cover the TVA, so that claims against the TVA are tested under its sue-and-be-sued clause.

In 1946, Congress passed the FTCA, which waived the sovereign immunity of the United States for certain torts committed by federal employees. *See* 28 U.S.C. § 1346(b) (Pet. App. 25a–26a); *Meyer*, 510 U.S. at 475–76. "In order to place torts of 'suable' agencies upon precisely the same footing as torts of 'nonsuable' agencies, Congress, through the FTCA, limited the scope of sue-and-be-sued waivers." *Meyer*, 510 U.S. at 476 (quoting *Loeffler*, 486 U.S. at 562). The limitation provides:

> The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under [28 U.S.C.] section 1346(b) . . . , and the remedies provided by this title in such cases shall be exclusive.

28 U.S.C. § 2679(a) (Pet. App. 28a).

"Thus, if a suit is 'cognizable' under § 1346(b) of the FTCA, the FTCA remedy is 'exclusive' and the federal agency cannot be sued 'in its own name,' despite the existence of a sue-and-be-sued clause." *Meyer*, 510 U.S. at 476. However, § 2679(a) limits the scope of sue-and-be-sued waivers only "in the context of suits for which [Congress] *provided a cause of action* under the FTCA." *Id.* at 477 (quoting *Loeffler*, 486 U.S. at 562) (emphasis in *Meyer*).

Congress has not provided a cause of action under the FTCA against the TVA. The TVA, in fact, is expressly exempted from the FTCA. *See* 28 U.S.C. § 2680(l) (Pet. App. 36a) ("The provisions of this chapter [28 U.S.C. §§ 2671 *et seq.*] and [28 U.S.C.] section 1346(b) . . . shall not apply to . . . [a]ny claim arising from the activities of the Tennessee Valley Authority."). By the FTCA's express terms, the United States cannot be held liable for the TVA's actions. The Thackers' claims are thus not "cognizable" under § 1346(b). *See Meyer*, 510 U.S. at 476. As the FTCA does not constitute the Thackers' exclusive remedy, their claims are "therefore properly brought against [the TVA] 'in its own name.'" *Id.* at 478.

3. This Court's Correct Suability Test: *Burr–Loeffler–Meyer*

Sue-and-be-sued entities like the TVA are immune from suit in only a few circumstances. This Court defined those circumstances in 1940's seminal *Fed. Housing Admin. v. Burr*, 309 U.S. 242 (1940). The Court there wrote — in language that should have controlled the lower courts' analyses in this case:

> [W]aivers by Congress of governmental immunity . . . should be *liberally construed*. . . . Hence, when Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to "sue and be sued," it cannot be lightly assumed that restrictions on that authority are to be implied. Rather if the general authority to "sue and be

> sued" is to be delimited by implied exceptions, it must be *clearly shown* [1] that certain types of suits are not consistent with the statutory or constitutional scheme, [2] that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or [3] that for other reasons it was plainly the purpose of Congress to use the "sue and be sued" clause in a narrow sense.

Burr, 309 U.S. at 245 (footnote omitted) (emphases added). "Absent such a showing, agencies 'authorized to "sue and be sued" are presumed to have fully waived immunity.'" *Meyer*, 510 U.S. at 481 (quoting *Int'l Primate Protection League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 86 (1991)).[5]

The Court has confirmed that sue-and-be-sued clauses "are to be 'liberally construed,' notwithstanding the general rule that waivers of sovereign immunity are to be read narrowly in favor of the sovereign." *Id.* at 480 (quoting *Burr*, 309 U.S. at 245 and citing *Nordic Village*, 503 U.S. at 34). This Court has further explained: "[W]hen Congress launche[s] a governmental agency into the commercial world and endow[s] it with authority to 'sue or be sued,' *that agency is not less amenable to*

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[5] *International Primate* was superseded by statute on other grounds. *See, e.g., City of Cookeville v. Upper Cumberland Elec. Membership Corp.*, 484 F.3d 380, 389–90 (6th Cir. 2007); *Neb. ex rel. Dep't of Soc. Servs. v. Bentson*, 146 F.3d 676, 678 (9th Cir. 1998).

judicial process than a private enterprise under like circumstances would be." *Id.* at 481 (quoting *Burr*, 309 U.S. at 245) (emphasis in *Meyer*).[6]

4. The Decisive Effect of *Meyer*

This Court's decision in *Meyer* is conclusive. The Eleventh Circuit's sue-and-be-sued jurisprudence has walked the very path that *Meyer* declined to tread. More exactly, the *Meyer* Court held that *Burr's* immunity test could not be modified — that sue-and-be-sued clauses could not be pared back — by FTCA-based, immunity-broadening alterations of the sort that the Eleventh Circuit applied to the TVA here. *Id.* at 480–83. *Meyer* alone warrants reversing the decisions below.

In *Meyer*, the Federal Savings and Loan Insurance Corporation (FSLIC), a sue-and-be-sued entity,[7] served as a thrift institution's receiver. The FSLIC fired Meyer, a senior thrift officer. Meyer then sued the FSLIC, claiming that his discharge violated his due-process rights under the Fifth Amendment.

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[6] *Accord Franchise Tax Bd. of Cal. v. USPS*, 467 U.S. 512, 520 (1984) ("Under *Burr* not only must we liberally construe the sue-and-be-sued clause, but also we must presume that the [Postal] Service's liability *is the same as that of any other business.*") (emphasis added); *Loeffler*, 486 U.S. at 557 (through a sue-and-be-sued clause, "Congress waived [the Postal Service's] immunity . . . , authorizing recovery of interest from the Postal Service *to the extent that interest is recoverable against a private party* . . . .") (emphasis added). These parentheticals are taken from *Meyer*, 510 U.S. at 481.

[7] Congress empowered the FSLIC "to sue and be sued, complain and defend, in any court of competent jurisdiction." 12 U.S.C. § 1725(c)(4) (repealed 1989).

Id. at 473–74. The FSLIC argued that sovereign immunity barred Meyer's claims. *Meyer v. Fidelity Sav.*, 944 F.2d 562, 566 (9th Cir. 1991).

This Court disagreed. The Court first held that immunity had to be tested, not under the FTCA, but under *Burr*. *Meyer*, 510 U.S. at 476–81. More fully, the Court held that, because the United States has not made itself suable under § 1346(b) of the FTCA for constitutional torts, Meyer's Fifth Amendment claim was not cognizable under the FTCA and was properly brought against the FSLIC "in its own name." *Id.* at 477–78. The question thus became "whether the FSLIC's sue-and-be-sued clause waive[d] sovereign immunity for [that] claim." *Id.* at 479. The Court explained that that clause's "liberal[]" immunity waiver could "[]not be limited . . . unless" the FSLIC made a "clear showing" that satisfied one of *Burr's* three grounds for invoking immunity. *Id.* at 480 (citing cases). "Absent such a showing, agencies authorized to 'sue and be sued' are presumed to have fully waived immunity." *Id.* at 481 (quoting *International Primate*, 500 U.S. at 86 n. 8).

We now reach the crucial point: The *Meyer* Court rejected arguments, and approaches to sue-and-be-sued analysis, that are substantively indistinguishable from the Eleventh Circuit's precedent and its analysis in this case. The FSLIC had argued in *Meyer* that its amenability to suit should be "limited" to cases in which a private person could be sued. *Id.* at 480. "In essence," the Court explained, the FSLIC wanted to "engraft a portion of . . . § 1346(b) [of the FTCA] . . . onto [its] sue-and-be-sued clause," to diminish the clause's immunity

waiver. *Id.*[8] This Court rejected that approach — in a way that speaks directly to the Eleventh Circuit's analysis here. The *Meyer* Court explained that "sue-and-be-sued clauses cannot be limited by implication" without a "clear showing" under *Burr*. *Id.* at 480. The Court thus expressly declined to *"engraft language from § 1346(b) [of the FTCA] onto the [FSLIC's] sue-and-be-sued clause."* *Id.* at 480, 483 (emphasis added). The Court reasoned that the FSLIC's position, "taken to its logical conclusion . . . *would render coextensive the scope of the waivers contained in §1346(b) [of the FTCA] and sue-and-be-sued clauses generally.*" *Id.* at 483 (emphasis added). The Court refused to presume that Congress had intended that result. *Id.* "Had Congress wished to achieve that outcome," the Court explained, "it surely would not have employed the language it did in § 2679(a)." *Id.*

Because the FSLIC had made "no showing . . . to overcome [the] presumption" that the sue-and-be-sued clause "fully waived" the FSLIC's immunity, this Court held "that FSLIC's sue-and-be-sued clause [had] waive[d] the agency's sovereign immunity for Meyer's constitutional tort claim." *Id.* (quoting *Franchise Tax Board*, 467 U.S. at 520; and *International Primate*, 500 U.S. at 86 n.8).

The Eleventh Circuit has run afoul of all this. It "engrafts" an FTCA-derived limitation (the discretionary-function exception) onto the TVA's

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[8] Specifically, the FSLIC sought to "engraft" onto its suability clause "a portion of the sixth element of § 1346(b) — liability 'under circumstances where the United States, if a private person, would be liable to the claimant.'" *Meyer*, 510 U.S. at 480 (quoting 28 U.S.C. § 1346(b)(1)).

"broad" sue-and-be-sued immunity waiver. By its express terms, that waiver is limited only by other provisions of the Tennessee Valley Authority Act; it is not limited by anything in FTCA law. *See* 16 U.S.C. § 831c(b) (Pet. App. 18a).[9] The Eleventh Circuit thereby reads an implicit limitation into the TVA's sue-and-be-sued clause — one that the TVA's organic statute does not expressly or impliedly contain. *See id.* Furthermore, the Eleventh Circuit applied this limitation *before* the TVA made the "clear showing" that *Burr* requires to invoke immunity. Finally, roughly as in *Meyer*, the Eleventh Circuit's imported "discretionary-function exception" — embodying the "same test" that applies under the FTCA itself — would make sue-and-be-sued immunity waivers largely "coextensive" with such waivers under the FTCA. Yet neither the TVA's suability clause, nor the FTCA, suggests that Congress intended that equivalence. *See id.*; 28 U.S.C. § 2680(l) (Pet. App. 36a) (FTCA does not govern claims against TVA). The Court rejected this whole mode of reasoning in *Meyer*. It should reject it again here.

5. The Eleventh Circuit Reversed Key Underlying Principles

The Eleventh Circuit's departure from *Burr–Loeffler–Meyer* embodies several component errors. Both formally and substantively, for instance, the Eleventh Circuit reversed key underlying principles. That court transposed key elements of this Court's established guidance on how broadly or narrowly to

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[9] "Except as otherwise specifically provided *in this chapter* [the TVA Act], the [TVA] . . . [m]ay sue and be sued in its corporate name." 16 U.S.C. § 831c(b) (Pet. App. 18a) (emphasis added).

shape governmental immunity. The Eleventh Circuit took as its leading rule the directive that immunity waivers are to be read narrowly. *See Thacker*, 868 F.3d at 981 (Pet. App. 3a) ("When Congress waives sovereign immunity, we must strictly construe that waiver . . . in favor of the United States.") It then reasoned in a limiting way about how normally "broad" sue-and-be-sued clauses — which open entities like the TVA to suit — have "exceptions." *Id.* And, again, it then grafted the FTCA's discretionary-function exception onto the TVA's sue-and-be-sued rules. The Eleventh Circuit's first tenets thus biased its analysis toward broadening immunity and constricting sue-and-be-sued liability.

This gets the doctrinal priority backward — in a way that matters. This Court has said that sue-and-be-sued clauses are to be "liberally construed" — to permit suits — "*notwithstanding* the general rule" that narrows immunity waivers in the sovereign's favor. *Meyer*, 510 U.S. at 480–81 (citing *Burr*) (emphasis added); *see Loeffler*, 486 U.S. at 554–55 ("[W]hen Congress establishes such an agency . . . and permits it to 'sue and be sued,' it cannot be lightly assumed that restrictions on that authority are to be implied.") (citing cases). The Eleventh Circuit reversed, rewrote, and thus effectively gutted that rule. The intermediate court's guiding principle should have been one of "liberally" expecting that the TVA was open to suit.

6. The Eleventh Circuit Thwarted Statutes and Abraded Separation of Powers

By importing a discretionary-function exception from the FTCA to constrict the TVA's sue-and-be-sued clause, moreover, the appeals court thwarted the statutory framework, stymied Congressional intent and enactment, and thus eroded the separation of powers.

The Eleventh Circuit first brushed aside several statutes. The core statute — the TVA's sue-and-be-sued clause (16 U.S.C. § 831c(b) (Pet. App. 18a)) — contains no discretionary-function exception. By statutory directive, that clause is restricted only by other parts of the Tennessee Valley Authority Act. *Id.* None applies here. None appends a discretionary-function test to the sue-and-be-sued clause. The FTCA — from which the Eleventh Circuit has borrowed the discretionary-function exception[10] — excludes the TVA from its compass.[11]

Congress had "full power to endow the [TVA] with the government's immunity from suit or to determine the extent to which it may be subjected to the judicial process." *Burr*, 309 U.S. at 245–46. It could have included claims against the TVA in the FTCA, or amended the TVA Act to include discretionary-function immunity. It instead launched "the [TVA] into the commercial world" with a sue-and-be-sued clause and gave it the "status of a private commercial enterprise." *Loeffler*, 486 U.S. at 549. This Court has said that, "when Congress establishes" a

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[10] Pet. App. 6a.

[11] 26 U.S.C. § 2680(l) (Pet. App. 36a).

sue-and-be-sued entity, "*it cannot lightly be assumed that restrictions on that authority are to be implied.*" *Burr*, 309 U.S. at 245 (emphasis added). Absent a "clear" showing under *Burr*, "agencies 'authorized to "sue and be sued" are *presumed to have fully waived immunity.*'" *Meyer*, 510 U.S. at 481 (quoting *International Primate*, 500 U.S. at 86) (emphasis added). It is clear that Congress did not intend for the TVA's sue-and-be-sued clause be used in a narrow sense.

This consequently is not a case of keeping the judiciary from interfering with the executive. It is rather a case of the judiciary overriding Congress — to reshape the character that Congress gave the "broad[ly]" suable TVA. Due regard for the separation of powers lies in *upholding* the statutes by which Congress formed the TVA as a sue-and-be-sued entity.

Furthermore, the TVA is not a full-blown executive "agency" like the FBI or IRS. The TVA is "a corporate entity, separate and distinct from the Federal Government itself." *Pierce*, 314 U.S. at 310 (1941). The TVA "operates in much the same way as an ordinary business corporation, under the control of its directors in Tennessee, and not under that of a cabinet officer or independent agency headquartered in Washington." *Natural Resources Defense Council*, 459 F.2d at 257. When it created the TVA, Congress "intend[ed] that" it would "have much of the essential freedom and elasticity of a private business corporation." *Cooper*, 515 F.3d at 349 (quoting H.R. Rep. No. 73-130 at 19 (1933)).

The Fourth Circuit has thus correctly held that suits against the TVA do not raise separation-of-powers concerns. *Id.* at 348–49. That court has pointed to numerous ways in which Congress has separated the TVA from the government. For example, Congress has

> exempted the TVA from the civil service laws, 16 U.S.C. § 831b; exempted the TVA from the purchasing requirements otherwise applicable to federal entities, 16 U.S.C. § 831h(b); and provided the TVA with authority to issue bonds which are not obligations of the United States, 16 U.S.C. § 831n-4(b). Moreover, the TVA funds its power-generating programs itself rather than with congressional appropriations. 16 U.S.C. § 831n-4.

Id. at 349. "This degree of independence which the TVA possesses in large part alleviates" separation-of-powers concerns. *Id.* "A lawsuit against the TVA

> is not a suit against the United States itself *or one of its agencies subject to the direct executive control which is granted to the President by Article II of the Constitution*. Rather, a suit against the TVA is against "a governmental agency in[] the commercial world," [*Loeffler*, 486 U.S. at 555] . . . Because *the TVA is so far removed from the control of the Executive Branch*, operating as the functional equivalent of a private corporation, the judiciary does not run

> the same risk of overstepping its bounds and "prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions," [*McMellon v. United States*, 387 F.3d 329, 341 (4th Cir. 2004) (*en banc*)] . . . .

Id. (emphases added).[12]

Last in this vein, a judicial decision on the lawfulness of the TVA's actions giving rise to the Thackers' claims would not strip the TVA of its authority or burden its ability to execute its functions. At most, it would subject the TVA to the same failure-to-warn tort principles to which every private power company is subject. *See* 79 Cong. Rec. 6563-64 (1946) (statement of Sen. Hill) (Congress intended that legal claims "be exercised against the Tennessee Valley Authority exactly as they could have been exercised against . . . private utility companies.") Reversing the lower courts, and holding that the TVA can be liable for failing to reasonably warn of a downed power line, would certainly not "gravely interfere" with the TVA's multibillion-dollar power-generating business.

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[12] The TVA's separation-of-powers argument is further discussed below. *Infra*, Parts 8.2.2, 9.

7. The Circuit Split and Preemptive Replies

7.1. The Circuit Split

The Eleventh Circuit's sue-and-be-sued analysis — and, if the TVA is correct, the Sixth Circuit's, as well[13] — conflicts not only with this Court's precedent, but also with the correct approach taken by other circuits. The Fourth Circuit has thus assessed the TVA's immunity for claims arising from its commercial, power-generating activities (like the claims here) and has said: "We . . . hold that the broad waiver of sovereign immunity effected by the TVA's 'sue-and-be-sued' clause *is not restricted by a discretionary function exception* in this case." *Cooper*, 515 F.3d at 350 (emphasis added).[14] The Second Circuit agrees. In *Connecticut v. American Electric Power Co.*, 582 F.3d 309 (2d Cir. 2009), *rev'd in part on other grounds*, 564 U.S. 410 (2011), that court declined to apply a discretionary-function exception to the TVA's suability. *Id.* at 389–92. It instead correctly tested the TVA's immunity under the *Burr–Loeffler–Meyer* standard and held that the TVA's power-related activities were not exempt from suit. *Id.*

This situation denies citizens in the Sixth and Eleventh Circuits the rights that citizens of the Second and Fourth Circuits enjoy. The TVA is a

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[13] *See, e.g., Edwards v. TVA*, 255 F.3d 318 (6th Cir. 2001) (holding that discretionary-function exception applies to the TVA).

[14] The Fourth Circuit in *Cooper* did "not . . . reach" the question of whether the TVA ever "retains a measure of . . . immunity" when it otherwise "engages in a governmental function." *Cooper*, 515 F.3d at 350 n.4.

sprawling entity, whose commercial activity is continuously affecting Americans across the country — and affecting them in much the same way. Given the TVA's expansive reach, and the fact that the rights in question are basic, garden-variety tort rights to seek remedies for harmful misconduct, it is hard to imagine why the TVA should not be equally open to civil lawsuits wherever it operates.

7.2 Preemptive Replies

Numerous replies may be made regarding the TVA's position on how the Second and Fourth Circuits have (correctly) analyzed its immunity under *Burr-Loeffler-Meyer*.

First, the TVA distinguishes the most salient Second and Fourth Circuit cases (*American Electric* and *Cooper*) as having dealt with acts that were "considered 'commercial' rather than governmental."[15] But this observation cuts *against* the TVA. Both *American Electric* and *Cooper* were pollution-nuisance suits that challenged the TVA's general operation of coal-fired power plants.[16] If that higher-level conduct is "commercial" and not immune (because part of the TVA's essentially private power-generation business), then even more clearly not immune is the on-the-ground labor that is challenged here. The TVA might equally argue that managing an entire retail company is "commercial" and hence not immune, but removing a tripping hazard from the

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[15] *See* Cert. Opp. at 7, 15–16 (discussing *Cooper*, *supra*, and *American Electric*, *supra*).

[16] *See American Electric*, 582 F.3d at 325; *Cooper*, 515 F.3d at 346.

floor of the company's break room is somehow "policy"-laden, discretionary, and immune.

Second, the TVA has pointed out that the Sixth and Eleventh Circuits — whose use of a discretionary-function test the TVA asks this Court to uphold — "encompass the vast majority of the Tennessee Valley region."[17] The TVA thus argues for a rule in those circuits that not only abrades its organic statute and departs from this Court's precedent, but — as evidenced by this case — would, in all but the most marginal suits, leave the "vast majority" of its customers without normal tort remedies.

Third, the TVA complains that the Second and Fourth Circuits' "cramped understanding" of this Court's precedent would "push the courts" into the "quagmire" of distinguishing "governmental" from "non-governmental" functions.[18] This is backward. It is the *TVA's* discretionary-function test that would more surely push courts into parsing the discretionary from the merely ministerial (and so on). Such finely grained characterization is the whole aim of the discretionary-function test. The different framework of *Burr-Loeffler-Meyer* offers more inflection points for judicial decision, and so better avoids any "quagmire."

Furthermore, in its "quagmire" point, the TVA cites *Indian Towing Co. v. United States*, 350 U.S. 61 (1955).[19] But *Indian Towing* was an FTCA case; it

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[17] *See* Cert. Opp. at 8.

[18] *Id.* at 16.

[19] *Id.*

involved a claim against the United States where no sue-and-be-sued clause was at issue. Here, where the TVA was "launched" into the commercial world with a sue-and-be-sued clause, Congress clearly indicated its intention that the TVA be subject to suit as if it were privately owned. The starting point is thus assuming that the TVA performs private, rather than governmental, functions. The sue-and-be-sued entity then has the burden to clearly show the challenged conduct was committed in the course of a "governmental function."

Finally on this head, it is not the Second and Fourth Circuits that have distinguished the "governmental" from the "commercial" and "non-governmental" in this area, it is this Court. "[W]hatever principle" has animated the TVA's distaste for this distinction, moreover, it is "not controlling here." *Cooper*, 439 F. Supp. 2d at 491. "Where, as here, the question is one of recognizing implied limitations on an otherwise broad waiver of sovereign immunity for an entity like TVA, . . . the plain language of the *Loeffler–Burr* line of cases requires that a 'governmental' versus 'non-governmental' distinction be made." *Id.* at 491–92 (citing *Loeffler*, 486 U.S. at 555) ("[T]his Court has recognized that authorization of suits against federal entities engaged in *commercial* activities may amount to a waiver of sovereign immunity . . . .") (emphasis added).

8. The TVA Made No Showing Under *Burr–Loeffler–Meyer*

8.1 The TVA Did Not Try to Satisfy *Burr*

The TVA never even tried to show that this case meets one of *Burr's* three criteria for invoking immunity. Much less did the TVA make a "clear showing" that it is immune under *Burr*. For this reason alone, the jurisdictional dismissals should be reversed. *Cf. Meyer*, 510 U.S. at 481 (dismissing in one sentence defendant agency's failure to "attempt . . . the 'clear' showing . . . necessary to overcome the presumption that immunity has been waived").

8.2 The TVA Mishandles *Burr*

8.2.1 Question-Begging & Dicta

Against this Court's longstanding *Burr–Loeffler–Meyer* test, the TVA simply insists on the Eleventh Circuit's analytical approach. Which is to say, the TVA forces discretionary-function cases to the front of the analysis, while relegating sue-and-be-sued doctrine (under *Burr*) by silent fiat to a vague, subordinate role as somehow "consistent with" the FTCA case of *United States v. Smith*, 499 U.S. 160 (1991).[20]

This is question-begging. The TVA assumes (and asserts) what it is supposed to be proving. Exactly what is in question is whether a

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[20] *Id.* at 8.

discretionary-function exception displaces the long-governing sue-and-be-sued framework of *Burr*.

The TVA has leaned heavily on *Smith's* fleeting reference to "exceptions" to TVA suability. And to the fact that, in noting that some courts have found such "exceptions," *Smith* pointed to Sixth and Eleventh Circuit decisions in *Queen v. TVA*, 689 F.2d 80 (6th Cir. 1982) and *Peoples Nat'l Bank v. Meredith*, 812 F.2d 682 (11th Cir. 1987).

This does not persuade. *Smith's* reference to "exceptions" to TVA suability is dicta. More exactly, perhaps, that reference is ancillary to *Smith's* operative discussion under the FTCA (as modified by the Federal Employees Liability Reform and Tort Compensation Act of 1988). *See Smith*, 499 U.S. at 168–69. The *Smith* Court was not centrally discussing — never mind rendering definitive statements on — the limits of TVA immunity. *See id.*[21] From *Smith's* brief "exceptions" comment, it is not possible to reach conclusions about the extent of TVA suability — to say nothing of the precise conclusion that the TVA urges (that its suability is limited by a discretionary-function rule). It is moreover possible to read this section of *Smith* to yield the opposite conclusion. In this same passage, *Smith* also noted that "lower court cases" had "establish[ed] the TVA's own tort liability *independent of the FTCA*." *Id.* at 169 (emphasis added). Which resonates with *Meyer's* express refusal

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[21] *Smith's* whole statement on this point is: "Courts have read this 'sue or be sued' clause [16 U.S.C. § 831c(b)] as making the TVA liable to suit in tort, subject to certain exceptions." *Smith*, 499 U.S. at 168–69.

to borrow from the FTCA to diminish the TVA's openness to suit.

The two cases that *Smith* cites — *Queen* and *Meredith* — do not help the TVA. These cases merely confirm what no one disputes: that the Sixth and Eleventh Circuits eschew *Burr–Loeffler–Meyer* and instead use a discretionary-function test to determine when the TVA can be sued. Whether that approach is correct is the question that is now before this Court.

Furthermore, in applying a discretionary-function test, *Queen* and *Meredith* mainly just echo Sixth and Eleventh Circuit precedent. That is to say, on this question, *Queen* and *Meredith* mainly find the Sixth and Eleventh Circuits mutually amplifying each other. These cases draw on precious little authority from beyond their own jurisdictions: Three cases from the former Fifth Circuit[22] — which became binding Eleventh Circuit precedent when the latter court was created[23] — and one district-court case from Virginia.[24] So that the question again returns to whether the Sixth and Eleventh Circuits are correctly

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[22] *See Meredith*, 812 F.2d at 985 (citing *J.H. Rutter Rex Mfg. Co. v. United States*, 515 F.2d 97 (5th Cir. 1975)); *Queen*, 689 F.2d at 85 (citing *Painter v. TVA*, 476 F.2d 943 (5th Cir. 1973); *Lynn v. United States*, 110 F.2d 586, 590 (5th Cir. 1940)).

[23] *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (*en banc*) (adopting as binding precedent all decisions of the former Fifth Circuit rendered before October 1, 1981).

[24] *Queen*, 689 F.2d at 86 (citing *Pac. Nat'l Fire Ins. Co. v. TVA*, 89 F. Supp. 978 (W.D. Va. 1950)).

testing TVA immunity under an approach other than that marked out by *Burr–Loeffler–Meyer*.[25]

Finally, *Smith* certainly does not endorse the "exceptions" that are obliquely noted in *Queen* and *Meredith* in a way that would *sub silentio* overturn the whole line of *Burr–Loeffler–Meyer* precedent. Though that is what the TVA's position implies.

8.2.2 Mishandling *Burr*

The TVA contends that, at all lengths, "the first ground [of the *Burr* test] is satisfied here, because the TVA regularly exercises governmental functions, and immunity from suit for discretionary actions undertaken in that capacity arises from fundamental separation-of-powers principles."[26]

Again, *Burr's* first prong says that sue-and-be-sued entities may be immune from suit if it is "clearly shown" that the given "type[] of suit[]" is "not consistent with the statutory or constitutional scheme."[27]

Three problems infect the TVA's reasoning here. First, it is also true that the TVA "regularly exercises" non-governmental, *commercial* functions. And the TVA conduct that is at issue here — power generation, and specifically the work of safely raising power lines — is very much commercial. The TVA is

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[25] It may be worth nothing that *Queen* and *Meredith* were both decided before *Loeffler* and *Meyer* reaffirmed *Burr's* sue-and-be-sued analysis.

[26] *See* Cert. Opp. at 9.

[27] *Burr*, 309 U.S. at 245.

not acting here as some part of a sovereign government. It is not executing an Article II power. It is acting as a utility company. Even more exactly, its work in raising a power line is the work of an electrical contractor. There is nothing significantly "governmental" in that.

Second, the TVA here makes a deep error about the separation of powers. The Thackers discuss this point at greater length below. *Infra*, Part 9. For the moment, a summary should suffice: Congress has "absolute" and "plenary" power to shape sovereign immunity[28] — and it need not use a discretionary-function rule to widen that immunity. By adding a discretionary-function exception to alter the statutory scheme by which Congress created the TVA, it is the TVA's (and the Eleventh Circuit's) approach that runs afoul of separation of powers.

Third, if "governmental functions" and "discretionary actions" are immune because they meet *Burr's* first prong, then *Burr's* second prong is obviated. The second head of *Burr* already contemplates immunity for "governmental functions." Specifically, under its second head, *Burr* permits an "implied" immunity to arise if it is "clearly shown" that an "implied restriction of the general authority [to sue and be sued] is *necessary* to avoid *grave interference* with . . . a governmental function."[29] If discretionary, "governmental functions" are immune under *Burr's first* head, though, then this second

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[28] *Patchak v. Zinke*, 138 S. Ct. 897, 906 (2018) ("plenary"); *Schillinger v. United States*, 155 U.S. 163, 166 (1894) ("absolute").

[29] *Burr*, 309 U.S. at 245 (emphases added).

prong is made superfluous. Worse, the TVA's position erases *Burr's* further requirements that implied immunity be proven (1) "necessary" to (2) avoid "grave interference" with a "governmental function."

8.2.3 The TVA's Innate-Limitation Argument — and Its Errors

The TVA brushed aside *Burr*, *Loeffler*, and *Meyer*, and put all its chips on the notion that its sue-and-be-sued clause simply *is* limited by a judicially created discretionary-function exception. (Br. of Appellee TVA at 22–30[30]; Cert. Opp. at 7, 9–12). It invoked precedent from the Sixth and Eleventh Circuits that had used the exception to limit its amenability to suit. (Br. of Appellee TVA at 23–24, 30); Cert. Opp. at 8).

The TVA's analysis does nothing to override this Court's precedent — not only *Burr*, *Loeffler*, and *Meyer* themselves, but the statutes, cases, and principles upon which they drew. Its argument moreover is at times inscrutable. What does it mean, for instance, when, ostensibly commenting on *Burr's* three-part test, the TVA writes that,

> the scope of a Federal agency's sue-and-be-sued waiver with respect to a specific incident of suit is not a matter susceptible to textual parsing; rather, it

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[30] This citation refers to the TVA's main brief, filed in the Eleventh Circuit on September 29, 2017. Pinpoint citations are to the page numbers generated by that court's electronic-docketing system. That system did not assign the parties' filings unique document numbers, so this is the fullest cite that the Thackers can provide this Court.

> is a matter to be resolved by legal policy analysis . . . [?]

(Br. of Appellee TVA at 27). And what impact is that . . . insight . . . supposed to have on this analysis? It is far from clear. Whatever it means, though, it seems a fair rejoinder that the relevant "legal policy" is embedded in the "text[s]" that for decades have described the contours of TVA suability. From the terms of the Tennessee Valley Authority Act, and those of the FTCA, to the precedent from this Court, no governing text declares the TVA's sue-and-be-sued clause reduced by an implicit discretionary-function exception.

Elsewhere, the TVA contends:

> In [*Meyer*], the Court held that the [FSLIC]'s sue-and-be-sued clause did not bar a potential tort claim for an alleged constitutional violation . . . but nonetheless refused to recognize such a claim against Federal agencies as a matter of policy.

(*Id.* at 28) (citing *Meyer*, 510 U.S. at 480–86).

As a thumbnail description of *Meyer*, with no particular implication for this case, this passage is superficially accurate — as far as it goes. That is the most charitable reading one can give of this passage. But if, as seems the case, the TVA means to draw from *Meyer* a substantive lesson for this case, then its mistake is deep. The TVA in fact proffers a gross *non sequitur*. One that *Meyer expressly pointed out*. Like the FSLIC in *Meyer*, the TVA here "conflates" two

different things. *See Meyer*, 510 U.S. at 483–84. Whether the *Meyer* plaintiff had a viable claim was one thing; but this had nothing to do with whether the FSLIC's sue-and-be-sued clause made the agency *amenable* to such a claim. *See Id.* at 480–86. More to the present point, whether the *Meyer* plaintiff posed an actionable theory says nothing about whether a discretionary-function rule limits the TVA's suability. The *Meyer* Court expressly pointed out the distinction and the error. First, again, the Court "h[e]ld that FSLIC's sue-and-be-sued clause *waives the agency's sovereign immunity* for Meyer's constitutional tort claim." *Id.* at 483 (emphasis added). The Court then turned to the "second inquiry": "whether the . . . substantive law" recognized the posited claim. *Id.* at 484. For reasons entirely unrelated to the immunity waiver, the Court declined to recognize the novel theory that the *Meyer* plaintiff advanced. *Id.* at 483–86.[31] The breadth of the FSLIC's sue-and-be-sued clause, and the viability of the plaintiff's substantive claim, were two different things. *Meyer* itself called them "analytically distinct." *Id.* at 484. Returning to the identical error in the TVA's reasoning here, we can more precisely observe that the words "but nonetheless" in the TVA's explanation suggest a logical connection between the two parts of *Meyer* that simply does not exist. Again, the TVA presses its case on the strength of a plain *non sequitur*.

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[31] Specifically, the *Meyer* Court refused to expand constitutional-tort claims under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) so that they could be brought "directly against a federal agency." *Meyer*, 510 U.S. at 483–86.

The TVA's clearest argument insists (in sum) that waivers of governmental immunity — embodied here in its sue-and-be-sued clause — are innately limited by a discretionary-function exception.[32] That discretionary acts are always immune — regardless of what a sue-and-and-be-sued statute says. The TVA, in other words, sees a discretionary-function rule inherent in the notion of sovereign immunity. The Sixth and Eleventh Circuits, in the TVA's view, have merely recognized that fact.

Problems with that position leap off the page. Before anything else, the TVA's reasoning collides with, and then tramples over, *Meyer's* overt refusal to "engraft" a discretionary-function limitation onto sue-and-be-sued clauses "generally." More strikingly, the TVA's position implies that, since at least 1940, this Court has failed to understand the correct bounds of sovereign immunity. That, had the Court rightly grasped the shape of that immunity, it would never have written *Burr*, *Loeffler*, and *Meyer*, but instead would have appended a discretionary-function exception to all such sue-and-be-sued clauses.

9. Congress Has "Absolute" Power to Shape Sovereign Immunity — The TVA Thus Asks This Court to Violate Separation of Powers

The TVA's most central argument is that discretionary-function immunity is innately entwined in separation-of-powers principles.[33] It argues that a discretionary-function exception is necessary to

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[32] *See* Cert. Opp. at 9–12.

[33] *See id.*

"prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."[34] This argument goes in several wrong directions at once.

First, the TVA mistakes how the relevant power is allocated. This Court has long recognized that defining the jurisdiction of the federal courts — what claims the courts can and cannot hear, and defining the associated breadth of sovereign immunity — are both within Congress's "absolute" and "plenary" power. "The United States cannot be sued in their courts without their consent, and in granting such consent Congress has an absolute discretion to specify the cases and contingencies in which the liability of the Government is submitted to the courts for judicial determination." *Schillinger*, 155 U.S. at 166. "So long as Congress does not violate other constitutional provisions, its 'control over the jurisdiction of the federal courts' is 'plenary.'" *Patchak*, 138 S. Ct. at 906 (citing *Trainmen v. Toledo, Peoria & W. R.R.*, 321 U.S. 50, 63–64 (1944) and *Bowles v. Russell*, 551 U. S. 205, 212 (2007) ("Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider.")) This Court has also repeatedly held that "Article III's 'arising under' jurisdiction is broad enough to authorize Congress to confer federal-court jurisdiction over actions involving federally chartered corporations." *Am. Nat'l Red Cross v. S.G.*, 505 U.S. 247, 264 (1992) (citing cases).

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[34] *Id.* at 6, 9.

An immediate corollary of these rules is that (contrary to the TVA's understanding) the separation of powers does *not* innately entail a non-waivable discretionary-function exception to otherwise broad waivers of sovereign immunity. Separation of powers is perfectly consistent with whatever description of immunity Congress chooses to enact. Congress may enact a discretionary-function exception in some contexts; it may withhold it in others; and it may, in its "plenary" power, enact another immunity framework entirely — such as creating sue-and-be-sued entities that are open to liability in the same manner as private actors.

By authorizing the TVA to sue and be sued – by waiving any sovereign immunity the TVA may have enjoyed — Congress "submitted" cases against the TVA "to the courts for judicial determination." And Congress placed no discretionary-function "contingencies" on the TVA's broad waiver of immunity. It instead launched the TVA into the commercial world with a sue-and-be-sued clause, making it "*not less amenable to judicial process than a private enterprise* under like circumstances would be." *Meyer*, 510 U.S. at 481 (quoting *Burr*, 309 U.S. at 245) (emphasis in *Meyer*). An abrasion of separation of powers therefore lies in the lower courts' refusing to exercise the jurisdiction conferred by Congress and in creating a "contingency" (the discretionary-function exception) where Congress did not.

Second, the TVA's whole separation-of-powers argument is misplaced. The TVA's complaint should be directed, not at the courts for exercising the jurisdiction that Congress conferred, but rather to Congress for conferring that jurisdiction in the first

place. Again, Congress has "absolute discretion to specify the cases and contingencies in which the liability of the Government is submitted to the courts for judicial determination." *Schillinger*, 155 U.S. at 166. That discretion is "plenary" so long as it does not "violate other constitutional provisions." *Patchak*, 138 S. Ct. at 906. Given Congress's power to define the jurisdiction of the federal courts, the TVA's complaint can be lodged only against Congress for waiving its sovereign immunity without adding back a discretionary-function exception — for the claim that this somehow violates the Constitution. But the TVA makes no such argument. Its complaint is directed instead toward the courts and their exercise of jurisdiction — a jurisdiction that the lower courts clearly had.

CONCLUSION

The lower courts erred by failing to apply the suability test that this Court set forth in *Burr*, *Loeffler*, and *Meyer*. And the TVA failed to meet its burden under that test in all respects. The Eleventh Circuit's use of a "discretionary-function exception" borrowed from the FTCA is at odds with both this Court's longstanding precedent, and the correct approach taken by other circuits. The Thackers thus ask the Court to reverse the lower courts' sovereign-immunity dismissal of this suit.

Respectfully submitted,

Franklin T. Rouse
Counsel of Record
CONCHIN CLOUD & COLE, LLC
2404 Commerce Court, S.W.
Huntsville, Alabama 35801
(256) 705-7777
taylor@conchincloudcole.com
Counsel for Petitioners

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No. 17-1201

In the Supreme Court of the United States

GARY THACKER AND VENITA L. THACKER, PETITIONERS

v.

TENNESSEE VALLEY AUTHORITY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ANN O'CONNELL ADAMS
Assistant to the Solicitor General
MARK B. STERN
WEILI J. SHAW
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

SHERRY A. QUIRK
General Counsel
DAVID D. AYLIFFE
Associate General Counsel
JAMES S. CHASE
Senior Attorney
Tennessee Valley Authority
Knoxville, TN 37902

QUESTION PRESENTED

Whether the court of appeals correctly held that the Tennessee Valley Authority (TVA), a wholly owned agency and instrumentality of the United States, may under certain circumstances invoke immunity for its performance of discretionary functions, including emergency response and the TVA's statutory authority to construct and repair electric power-transmission infrastructure.

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In the Supreme Court of the United States

No. 17-1201

GARY THACKER AND VENITA L. THACKER, PETITIONERS

v.

TENNESSEE VALLEY AUTHORITY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 868 F.3d 979. The order of the district court is reported at 188 F. Supp. 3d 1243 (Pet. App. 12a-16a).

JURISDICTION

The judgment of the court of appeals (Pet. App. 10a-11a) was entered on August 22, 2017. A petition for rehearing was denied on November 28, 2017 (Pet. App. 17a). The petition for a writ of certiorari was filed on February 26, 2018. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. In 1933, large parts of the predominantly rural Tennessee Valley region were experiencing dire economic and living conditions, even by depression-era standards. See Tennessee Valley Authority, *A History*

of the Tennessee Valley Authority 9 (1983) (*TVA History*).[1] Annual per capita income in the region was only 45% of the national average, soil erosion from outdated farming practices had damaged millions of acres of farmland, poor logging practices had nearly ruined vast forests, flooding of the Tennessee River was uncontrolled and commercial navigation was difficult, and electricity was virtually nonexistent in the region's vast rural areas. See *id.* at 5, 9, 12, 15, 45. More than half of the region's residents lived on farms, and only three farms in every 100 had electricity, because private power companies considered service to rural farmsteads to be uneconomic. *Id.* at 9, 12. Against that background, in the first 100 days of President Franklin Roosevelt's first term, Congress enacted the Tennessee Valley Authority Act of 1933 (TVA Act), 16 U.S.C. 831 *et seq.*

The TVA Act created the Tennessee Valley Authority (TVA), which is "an agency of the Federal Government," *Ashwander* v. *TVA*, 297 U.S. 288, 315 (1936), and a "wholly owned public corporation of the United States," *TVA* v. *Hill*, 437 U.S. 153, 157 (1978). President Roosevelt envisioned that TVA would "be charged with the broadest duty of planning for the proper use, conservation, and development of the natural resources of the Tennessee River drainage basin and its adjoining territory for the general social and economic welfare of the nation." H.R. Doc. No. 15, 73d Cong., 1st Sess. 1 (1933) (H.R. Doc. 15). The broad responsibilities of TVA "relate to navigability, flood control, reforestation, [the proper use of] marginal lands, and agricultural and

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[1] Https://www.tva.com/file_source/TVA/Site%20Content/About%20TVA/Our%20History/A%20History%20of%20The%20Tennessee%20Valley%20Authority.pdf.

industrial development of the whole Tennessee Valley." *United States ex rel. TVA* v. *Welch*, 327 U.S. 546, 553 (1946); see 16 U.S.C. 831, 831n-4(h), 831dd.

Over the years, the focus of TVA's activities has varied as a result of external events and the completion of major capital projects. In the early decades of TVA, the agency administered reforestation and fertilizer programs, and a major focus was on building dams to control flooding and improve navigation on the Tennessee River. *TVA History* 10, 15-17. During World War II, emergency dam and power plant construction supported power generation needed for war production of aluminum. *Id.* at 19, 21. For several decades following the war, TVA constructed new power plants to facilitate increased domestic use of electricity and Cold War uranium enrichment. *Id.* at 25, 28, 37, 45.

In the past decade, TVA's development activities have focused on the operation and maintenance of the power system and the Tennessee River system. The TVA Act authorized TVA to produce and sell electric power at rates as low as feasible. 16 U.S.C. 831d(*l*); 831j; 831n-4(f). TVA's power generating facilities include 29 conventional hydroelectric sites, one pumped-storage hydroelectric site, eight coal-fired sites, three nuclear sites, 16 natural gas or oil-fired sites, and one diesel generator site. See TVA, *FY 2019 Budget Proposal & Management Agenda and FY 2017 Performance Report* 3-5 (Feb. 12, 2018) (*2017 Performance Report*).[2] TVA sells wholesale electricity to municipalities and other local governmental entities and cooperatives that operate local public power electric systems,

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[2] Http://www.tva.gov/cj. The 2017 Performance Report was submitted to the Office of Management and Budget and to Congress pursuant to 31 U.S.C. 1116.

and it sells power directly to a limited number of end-use customers. *Ibid.*

To operate the power system, Congress authorized TVA to, *inter alia*, "construct * * * transmission lines * * * in the Tennessee River and its tributaries." 16 U.S.C. 831c(j). As part of that authority, TVA may "exercise the right of eminent domain" and "condemn all property that it deems necessary" for its purposes. 16 U.S.C. 831c(i). Title to all real property deemed necessary to accomplish the purposes of the Act is held in the name of the United States and the property is "entrusted to [TVA] as the agent of the United States to accomplish the purposes of [the TVA Act]." 16 U.S.C. 831c(h). The TVA's power generation activities are an essential part of the Nation's electric power supply. See Pet. 7 n.3. As of 2015, TVA supplied power to more than nine million people in seven States. See *ibid.*

As for the Tennessee River system, TVA operates a series of 49 dams as an integrated system on the Tennessee River and its tributaries to reduce the risk of flooding, facilitate navigation, produce hydroelectric power, improve water quality and supply, and provide recreational opportunities. *2017 Performance Report* 5. As noted above (see p. 3, *supra*), TVA has constructed hydroelectric power plants at many of its dams on the Tennessee River, thereby enabling the dams to "generat[e] * * * electric energy" in addition to "regulat[ing] the stream flow * * * for the purposes of promoting navigation and controlling floods." 16 U.S.C. 831h-1.

TVA is currently self-funded, financing its activities almost entirely from power revenues and power system financing. See 16 U.S.C. 831n-4(h) (authorizing TVA to

issue power bonds for financing). The agency is governed by a board of nine members appointed by the President with the advice and consent of the Senate. 16 U.S.C. 831a(a)(1). The board "may designate employees of the corporation to act as law enforcement agents" on government land and facilities entrusted to TVA, in accordance with guidelines approved by the Attorney General. 16 U.S.C. 831c-3(a), (c), and (h). Of central relevance to this case, Congress provided in the organic act that TVA "[m]ay sue and be sued in its corporate name." 16 U.S.C. 831c(b). In the words of President Roosevelt, an overarching purpose of the TVA Act was to create an entity "clothed with the power of government but possessed of the flexibility and initiative of a private enterprise." H.R. Doc. 15, at 1.

2. In 1946, Congress enacted the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.* The FTCA waives the United States' sovereign immunity from damages claims based on "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). In Section 2680, Congress carved out several exceptions to that waiver of immunity. Under one such exception, known as the discretionary function exception, the waiver of sovereign immunity in the FTCA "shall not apply" to any claim based upon a federal employee's "exercise or performance or the failure to exercise or perform a discretionary function or duty." 28 U.S.C. 2680(a). The United States thus has maintained its immunity from

tort claims that arise in the performance of a government employee's discretionary functions.

When Congress enacted the FTCA in 1946, many federal agencies were already subject to general sue-and-be-sued clauses in their organic statutes. *Loeffler* v. *Frank*, 486 U.S. 549, 562 (1988). In the FTCA, Congress generally placed those "suable" agencies "upon precisely the same footing as torts of 'nonsuable' agencies.'" *Ibid.* (quoting H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945)). It did so by enacting Section 2679(a), which provides that "the authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive." 28 U.S.C. 2679(a); see *Loeffler*, 486 U.S. at 562.

Congress exempted some federal agencies from the FTCA altogether. As relevant here, Section 2680 provides that the jurisdictional and liability provisions of the FTCA shall not apply to "[a]ny claim arising from the activities of the Tennessee Valley Authority." 28 U.S.C. 2680(*l*). The waiver of TVA's immunity from tort claims is thus governed by the sue-and-be-sued clause in its organic act, 16 U.S.C. 831c(b). Congress has further exempted from the FTCA "any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States." 28 U.S.C. 2680(d).

3. On July 30, 2013, TVA was replacing an overhead conductor on a transmission line that spanned Wheeler Reservoir—a body of water created by the Wheeler Dam—on the Tennessee River. Compl. ¶ 8. At approximately 2:40 p.m., a pulling cable failed, releasing the

tension on the line and allowing it to fall into the water between the towers. Compl. ¶ 10.

At 3:10 p.m., TVA informed the U.S. Coast Guard of the situation, and the Coast Guard established a Marine Safety Zone prohibiting all vessels from entering the Tennessee River between miles 297 and 298. C.A. App. 48, ¶ 5 (Carman Declaration). At 3:40 p.m., the Coast Guard broadcast notice of the Marine Safety Zone and the closure of the River on marine radio. *Ibid.* The Coast Guard reissued the Notice hourly thereafter in accordance with the regular schedule for such notices. *Ibid.* Entry into the area without Coast Guard authorization was a violation of federal law. See 33 C.F.R. 165.20, 165.23.

At 5:30 p.m., Petitioner Gary Thacker and a passenger began traveling downstream from Ingalls Harbor, approximately five miles upriver from the downed conductor. Compl. ¶ 16. Thacker's boat traveled at high speed, reaching the downed conductor in about five minutes. Compl. ¶ 17.

TVA had two patrol boats at the site of the downed conductor. Compl. ¶ 15. Wheeler Reservoir is over one mile wide at that location. Compl. ¶ 14. As a result of the speed of Thacker's boat and the patrol patterns of the patrol boats, neither patrol boat was able to stop Thacker's boat from reaching the downed line. Compl. ¶ 12; C.A. App. 48-49, ¶¶ 6-7. At the time, TVA employees and contractors were in the process of pulling the conductor out of the water, and the line was still low over the surface of the water. Compl. ¶ 18. Thacker's boat struck the line, "[i]nstead of being able to pass safely over it." *Ibid.* His passenger was killed and Thacker suffered physical injuries. *Ibid.*

4. Thacker and his wife (petitioners) filed suit against TVA under common-law theories of negligence and wantonness. Compl. ¶¶ 24-31. The complaint alleged that "TVA should have instituted heightened and stringent criteria for contractors to qualify to perform boat patrol activities," and that it "should have instituted and/or required training for contractors in the proper procedures to patrol boat traffic on the Tennessee River in the event of any emergency situation." Compl. ¶ 6. The complaint further alleged that TVA had breached a "duty to exercise reasonable care in warning boaters on the Tennessee River of the hazards it created," and "to exercise reasonable care in the assembly and installation of the power lines across the Tennessee River." Compl. ¶ 25.

The district court granted TVA's motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), holding that TVA is immune from petitioners' suit. Pet. App. 12a-16a.[3] The court noted that while the TVA Act authorizes TVA to "sue and be sued in its corporate name," 16 U.S.C. 831c(b), thereby generally waiving sovereign immunity to tort suits, that liability is "subject to certain exceptions," Pet. App. 14a (quoting *United States* v. *Smith*, 499 U.S. 160, 169 (1991)). One exception recognized by the Eleventh Circuit is immunity for TVA from claims based on its performance of certain governmental, discretionary functions. See *id.* at 13a-14a. Applying this Court's two-part test for applying the discretionary function exception in the FTCA, see *United States* v. *Gaubert*, 499 U.S. 315, 322-325

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[3] The Eleventh Circuit has held that the application of immunity results in a dismissal for lack of subject matter jurisdiction. See, *e.g.*, *United States Aviation Underwriters, Inc.* v. *United States*, 562 F.3d 1297, 1299 (per curiam), cert. denied, 558 U.S. 1024 (2009).

(1991), the district court held that TVA is immune from this action because the conduct challenged here—including the TVA's safety decisions in response to a water-hazard emergency—(1) did not violate a mandatory statute, regulation, or policy that allowed for no judgment or choice; and (2) was the kind of conduct protected by the discretionary function exception. Pet. App. 14a-15a (citing *Gaubert*, 449 U.S. at 322-323). The court stated that it is "axiomatic 'that safety decisions represent an exercise of discretion giving rise to governmental immunity.'" *Ibid.* (quoting *Johns* v. *Pettibone Corp.*, 843 F.2d 464, 467 (11th Cir. 1988)). Because the court found the alleged TVA conduct to be "the type that the discretionary function exception was designed to protect," it granted TVA's motion to dismiss. *Id.* at 15a-16a.

5. The court of appeals affirmed. Pet. App. 1a-9a. The court recognized this Court's decisions in *Loeffler*, 486 U.S. at 554, and *Federal Housing Administration* v. *Burr*, 309 U.S. 242, 245 (1940), stating that "'sue-and-be-sued' waivers are liberally construed." Pet. App. 4a (citation omitted). But it also noted this Court's statement in *Smith* that courts have interpreted this language to mean that TVA is "liable to suit in tort, subject to certain exceptions," *ibid.* (quoting *Smith*, 499 U.S. at 168-169). The court of appeals also noted its own precedent—cited by this Court in *Smith*, 499 U.S. at 169—that TVA is immune "when engaged in governmental functions that are discretionary in nature." *Ibid.* (citing *Peoples Nat'l Bank* v. *Meredith*, 812 F.2d 682, 685 (11th Cir. 1987)). The court of appeals concluded that, here, "TVA's challenged actions occurred in the context of its performance of a governmental function." *Ibid.*

The court of appeals explained that TVA may exercise the power of eminent domain when it constructs power-transmission lines. Pet. App. 4a-5a (citing 16 U.S.C. 831c(h) and (i)). Because the power of eminent domain "belongs solely to the United States, not to commercial entities," TVA "acts as an agency of the United States" when it constructs transmission lines. *Id.* at 5a. The court thus held that TVA was entitled to assert discretionary function immunity against petitioners' allegation that the TVA had "failed to exercise reasonable care in the assembly and installation of power lines across the Tennessee River." *Ibid.* The court further held that petitioners' allegations that TVA had "failed to exercise reasonable care in warning boaters on the Tennessee River of the hazards [TVA] created" concerned activities that were also "incident to TVA's construction of power-transmission lines," and thus within the TVA's governmental functions. *Ibid.*

Applying the two-step *Gaubert* analysis, the court of appeals held that the alleged conduct in this case fell within TVA's immunity for discretionary actions. Pet. App. 6a-8a. At the first step of the analysis, a court considers whether an employee's discretion has been cabined by a specific, mandatory directive. *Gaubert*, 499 U.S. at 322. The court concluded that petitioners had "point[ed] to no specific federal statute, regulation, or policy that sets forth a particular course of action for employees raising a power line from a river to follow, either in the construction of the line or in safety precautions to undertake to protect the public." Pet. App. 7a. At the second step, a court considers whether the conduct at issue is "grounded in social, economic, and political policy" and thus is within the purpose of immunity for discretionary functions. *Gaubert*, 499 U.S. at 323.

The court concluded that the conduct at issue satisfies that standard because "[t]he challenged actions and decisions in this case could require TVA to consider, among other things, its allocation of resources (such as personnel and time), public safety, cost concerns, benefits, and environmental impact." Pet. App. 7a.

6. Petitioners sought review by this Court on two questions: (i) whether the waiver of sovereign immunity in TVA's sue-and-be-sued clause is subject to a discretionary function exception, and (ii) whether the court of appeals properly applied the discretionary function exception on the facts of this case. Pet. i. This Court granted the petition for a writ of certiorari limited to the first question presented in the petition. 9/28/18 Order.

SUMMARY OF ARGUMENT

The court of appeals correctly held that TVA may assert immunity from tort claims based on the agency's exercise of discretionary functions.

A. The TVA Act provides that TVA may "sue and be sued in its corporate name." 16 U.S.C. 831c(b). This Court has long recognized that such provisions do not waive sovereign immunity in certain circumstances. In *Federal Housing Administration* v. *Burr*, 309 U.S. 242 (1940), the Court explained that a sue-and-be-sued clause may be subject to an implied limitation if it can be shown, *inter alia*, that certain types of suits are not consistent with the constitutional or statutory scheme, or that an implied restriction is necessary to avoid grave interference with the performance of a governmental function. *Id.* at 245.

B. Applying the first basis identified in *Burr*, the TVA Act's sue-and-be-sued clause does not waive sovereign immunity for tort claims arising from TVA's exercise of its discretionary functions.

1. Immunity for discretionary functions is a crucial and longstanding form of protection for the government from judicial intrusion into the exercise of discretionary functions. The roots of that protection trace at least to *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), and it is grounded in separation-of-powers principles and the need to protect the ability of government personnel to exercise judgment and discretion. The sovereign immunity from claims based on discretionary functions thus serves to prevent judicial second-guessing of government decisions that are grounded in social, economic, or political policy through individual tort actions. The common law similarly barred suits for damages against federal employees arising out of actions that involved their exercise of discretionary judgment. When Congress enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563 (28 U.S.C. 2679), it expanded the immunity of federal employees even beyond their performance of discretionary functions to cover all common-law tort suits for actions taken within the scope of their employment, and Congress instead provided for the substitution of the United States as the defendant under the FTCA, which already contained a discretionary function exception.

When Congress enacted the FTCA, it codified immunity for discretionary functions through an express exception. But the FTCA's legislative history, which this Court reviewed in depth in *Dalehite* v. *United*

States, 346 U.S. 15 (1953), indicates that Congress understood that the government would not be liable for torts committed in the exercise of discretionary functions, even without an explicit statutory exception to the FTCA's waiver of sovereign immunity. The FTCA's discretionary function exception was drafted as a clarifying amendment, to ensure that the FTCA's waiver of immunity would not be so construed.

In other areas, this Court has adopted limiting constructions of statutes to preserve traditional immunities and protections of the federal government absent an express congressional command to the contrary. Along those lines, a number of courts have concluded that a waiver of the government's immunity from tort suits challenging the performance of discretionary functions likewise requires a clear statutory expression.

2. In the same provision that exempts claims arising from activities of the TVA from the FTCA's coverage, Congress also provided that the FTCA shall not apply to claims brought under the Suits in Admiralty Act (SIAA), 46 U.S.C. 30901 *et seq.* See 28 U.S.C. 2680(d). Although the SIAA's immunity waiver provision does not contain a discretionary function exception, every court of appeals to have considered the question has recognized that the waiver does not extend to suits based on the exercise of discretionary functions.

3. The same separation-of-powers principles apply equally to tort claims brought against TVA, which is an Executive Branch agency. TVA's control of the water level in a reservoir, for example, may require the exercise of policy judgment to balance competing interests. And judgments about the best way to warn boaters of an emergency may also require balancing of infor-

mation about the efficacy of different forms of communication and the resources available. Indeed, before and shortly after the FTCA was enacted, federal district courts determined that TVA could not be sued for actions taken for flood control purposes or alterations of the river because of discretionary function immunity. If any aggrieved person could challenge those decisions through a tort action for damages, judges would be in the position of second-guessing the agency's policy decisions.

C. Construing TVA's sue-and-be-sued clause not to extend the waiver of sovereign immunity to suits based on discretionary functions is also appropriate under *Burr*'s second justification because it is necessary to avoid grave interference with the performance of government functions that Congress has assigned to TVA. Petitioners contend that the TVA activities at issue in this case—constructing and maintaining electric power infrastructure, as well as emergency response—are not governmental activities. That contention is mistaken. TVA is specifically authorized to produce and sell electric power to promote the general welfare of the region, and it has been given eminent domain power on behalf of the United States to accomplish those duties. More generally, this Court's precedent does not support petitioner's effort to parse the TVA's activities and treat as commercial or non-governmental any activity also performed by private entities.

D. Petitioners contend that TVA is attempting to engraft the FTCA's discretionary function exception onto the TVA Act's sue-and-be-sued clause. That is incorrect. TVA's argument is instead that the Court should decline to read the sue-and-be-sued clause as abrogating TVA's immunity from suits arising from the

performance of discretionary functions, based on separation-of-powers principles that predate the FTCA and the need to protect the ability of the government to exercise judgment and discretion. Petitioners further contend that construing the TVA Act's sue-and-be-sued clause not to waive sovereign immunity for discretionary functions would itself offend the separation of powers because it would contravene Congress's power to dictate waivers of sovereign immunity. But the question here is whether Congress intended to subject TVA to tort claims for the activities of its employees engaged in discretionary functions by including a general sue-and-be-sued clause in the agency's organic statute. The history of the discretionary function exception, the TVA Act, and the FTCA all support the conclusion that Congress would have expected TVA to be immune from such claims.

ARGUMENT

THE GENERAL WAIVER OF IMMUNITY FROM SUIT IN THE TVA ACT'S SUE-AND-BE-SUED CLAUSE DOES NOT EXTEND TO CLAIMS BASED ON TVA'S PERFORMANCE OF DISCRETIONARY FUNCTIONS

Because "claims arising from activities of the Tennessee Valley Authority" are excluded from the waiver of sovereign immunity in the FTCA, 28 U.S.C. 2680(*l*), the discretionary function exception contained to that immunity in the FTCA does not govern petitioners' suit. The court of appeals, however, correctly recognized that TVA nevertheless is immune from tort claims that arise from the agency's exercise of its discretionary functions. This Court has recognized that Congress's waiver of an agency's immunity through a general sue-and-be-sued clause, such as the one contained in the TVA Act, 16 U.S.C. 831c(b), may be subject to implied

limitations. The TVA Act's sue-and-be-sued clause, properly interpreted, does not abrogate the longstanding immunity from suit based on claims arising out of the performance of discretionary functions. There is no indication that Congress intended to subject TVA to liability for the performance of discretionary functions. And the preservation of immunity from such claims is necessary to protect separation-of-powers principles reflected in the constitutional and statutory schemes and to prevent interference with TVA's governmental functions.

A. Sue-And-Be-Sued Clauses Embody Limitations On The Waiver Of Sovereign Immunity Applicable In Appropriate Circumstances

The TVA Act provides that TVA may "sue and be sued in its corporate name." 16 U.S.C. 831c(b). As this Court has explained, "[c]ourts have read" that provision to "mak[e] the TVA liable to suit in tort, *subject to certain exceptions.*" *United States* v. *Smith*, 499 U.S. 160, 168-169 (1991) (emphasis added). In support of that observation, *ibid.*, the Court cited *Peoples National Bank* v. *Meredith*, 812 F.2d 682, 684-685 (11th Cir. 1987), and *Queen* v. *TVA*, 689 F.2d 80, 85 (6th Cir. 1982), cert. denied, 460 U.S. 1082 (1983), both of which held that TVA's sue-and-be-sued clause does not waive immunity from tort suits arising from the agency's exercise of discretionary functions. See *People's Nat'l Bank*, 812 F.2d at 684-685 (finding TVA immune from tort claim arising from agency's development and administration of a loan program); *Queen*, 689 F.2d at 84-85 (finding TVA immune from tort claim arising from agency's actions pursuant to a statutory mandate directing TVA to conduct studies and experiments to promote the wider and better use of electric power). Subsequent decisions from

those circuits adhere to the holding that TVA may invoke discretionary function immunity. See *Bobo* v. *TVA*, 855 F.3d 1294, 1309 (11th Cir. 2017) (acknowledging that TVA's waiver of sovereign immunity is subject to an exception for discretionary functions, but finding that it did not apply in a tort action arising from exposure to asbestos fiber from a TVA nuclear power plant); *Edwards* v. *TVA*, 255 F.3d 318, 320 (6th Cir. 2001) (finding TVA immune from tort claim where fisherman fell from rocky shoreline near a TVA dam).

The court of appeals' conclusion (Pet. App. 4a) that TVA is immune from tort actions based on the performance of discretionary functions is consistent with this Court's decisions addressing sue-and-be-sued clauses. This Court has long recognized that such waivers must "be construed with reference to the powers conferred by the provisions to which they relate" and are subject to implied limitations in appropriate circumstances. *People of Porto Rico* v. *Rosaly y Castillo*, 227 U.S. 270, 277 (1913). In *Federal Housing Administration* v. *Burr*, 309 U.S. 242 (1940), the Court stated that although a waiver of immunity from suit through a general sue-and-be-sued clause should be "liberally construed," implied limitations to the waiver may be warranted in certain circumstances. *Id.* at 245.

The question in *Burr* was whether the Federal Housing Administration (FHA), created in 1934, see Act of June 27, 1934, ch. 847, Tit. I, § 1, 48 Stat. 1246, was subject to garnishment for money due to an employee. *Burr*, 309 U.S. at 243. In creating the FHA, Congress had provided that the Administrator was authorized "to sue and be sued in any court of competent jurisdiction, State or Federal." *Id.* at 244 (quoting Act of Aug. 23, 1935, ch. 614, § 344(a), 49 Stat. 722). FHA asserted that

it was "an agency of the United States Government and * * * , therefore, not subject to garnishee proceedings." *Ibid.*

The Court observed in *Burr* that "when Congress establishes * * * an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to 'sue and be sued,' it cannot be lightly assumed that restrictions on that authority are to be implied." 309 U.S. 245. But the Court further explained that a sue-and-be-sued clause may be subject to implied limitations if it can be shown "[1] that certain types of suits are not consistent with the statutory or constitutional scheme, [2] that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or [3] that for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense." *Ibid.* (footnote omitted); see *Loeffler* v. *Frank*, 486 U.S. 549, 554-556 (1988); see also *FDIC* v. *Meyer*, 510 U.S. 471, 481 (1994).

As an example of the first category, the Court cited *People of Porto Rico*, which held that an organic act provision giving Puerto Rico's government the power "to sue and be sued" did not waive Puerto Rico's sovereign immunity. 227 U.S. at 277. The Court in *People of Porto Rico* explained that a sue-and-be-sued clause must "be construed with reference to the powers conferred by the provisions to which they relate," and it determined that Congress could not have "intended by the [sue-and-be-sued] clause * * * to destroy the government which it was its purpose to create." *Ibid.* The Court held that, notwithstanding the sue-and-be-sued clause, Puerto Rico remained immune from suit without its consent. *Ibid.* Thus, when consent to "sue and be sued" is given

by Congress, it is necessary for a court to determine whether the type of suit before it "comes within the scope of that authorization." *Burr*, 309 U.S. at 244; see *Meyer*, 510 U.S. at 482 (citing *Burr*, 309 U.S. at 244). As explained below, a tort suit based on TVA's performance of a discretionary function, a type of suit from which virtually every other federal agency would be immune, does not "come within the scope of th[e] authorization" by Congress, *Burr*, 309 U.S. at 244, in the TVA Act's sue-and-be-sued clause.

B. The TVA Act's Sue-And-Be-Sued Clause, Read In Light Of Separation-Of-Powers Principles, Does Not Waive Sovereign Immunity From Suits Based On The Performance Of Discretionary Functions

This suit falls squarely within the first category of cases in which the Court in *Burr* stated that a general sue-and-be-sued clause does not waive sovereign immunity. Tort suits based on TVA's exercise of discretionary functions "are not consistent with the statutory or constitutional scheme." 309 U.S. at 245. Allowance of such suits would conflict with the separation-of-powers principles that underlie the immunity from suit based on the performance of discretionary functions. Such suits would also be inconsistent with the statutory scheme. *Ibid.* As explained more fully at pp. 36-40, *infra* (discussing *Burr*'s second category), Congress has assigned broad and important duties to TVA, from controlling floods on the Tennessee River to providing electricity to the Tennessee Valley. It is difficult to imagine that Congress intended to abrogate sovereign immunity for discretionary functions, and subject TVA to individual tort suits for injuries caused by discretionary decisions of TVA employees, in carrying out such responsibilities.

1. The longstanding immunity from suit based on the performance of discretionary functions is grounded in separation-of-powers principles

The TVA Act's sue-and-be-sued clause does not contain an express discretionary function exception. And because TVA is exempt from the FTCA, 28 U.S.C. 2680(*l*), the statutory exception in the FTCA also does not apply. The doctrine of immunity from judicial intrusion into the performance of discretionary functions, however, is a longstanding one that predates the FTCA and is grounded in separation-of-powers principles. Congress's general authorization for TVA to "sue and be sued"—which does not specifically refer to tort suits for damages or particular grounds for immunity—does not contain the requisite manifestation of an intention to abrogate the government's immunity from such suits.

a. The immunity for discretionary functions is a crucial and longstanding form of immunity that protects the government from "liability for errors * * * in the exercise of discretionary functions." *Dalehite* v. *United States*, 346 U.S. 15, 26-27 (1953). Its foundation is "a concept of substantial historical ancestry in American law." *Id.* at 34. That history in the United States, this Court noted in *Dalehite*, *id.* at 34 n.30, dates at least to *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), in which Chief Justice Marshall stated that "[t]he province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion." *Id.* at 170. "Where the head of a department acts in a case, in which executive discretion is to be exercised," Chief Justice Marshall explained, "it is again repeated, that any application to a court to control, in any respect,

his conduct, would be rejected without hesitation." *Id.* at 170-171.

In the centuries since, this Court has repeatedly affirmed the importance of protecting discretionary functions from judicial oversight. See *Dalehite*, 346 U.S. at 34 & n.30. In 1845, for example, the Court stated that "a public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion; even although an individual may suffer by his mistake." *Kendall* v. *Stokes*, 44 U.S. (3 How.) 87, 98 (1845). The Court added that "[w]e are not aware of any case in England or in this country" to the contrary. *Id.* at 97; see also *Coates* v. *United States*, 181 F.2d 816, 818 (8th Cir. 1950) (citing cases from the 19th and early 20th centuries "in which the courts have had occasion to consider the meaning of 'discretionary functions' and to disclaim judicial power to interfere with, to enjoin or mandamus, or inquire into the wisdom or unwisdom or 'negligence' in their performance within the scope of authority lawfully granted").

The decisions recognizing immunity of the government from liability for errors in the exercise of discretionary functions are grounded in separation-of-powers principles. See, *e.g.*, *Marbury*, 5 U.S. (1 Cranch) at 170 ("Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."). Under those principles, challenges to the discretionary determinations of government officials are not appropriately addressed in a court of law through an individual action in tort. Indeed, this Court has explained that the purpose of immunity from damages actions based on such functions is to "prevent judicial 'second-guessing' of legislative

and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984). "A contrary principle would indeed be pregnant with the greatest mischiefs." *Kendall*, 44 U.S. (3 How.) at 98.

b. It is also significant that the common law similarly protected federal officers in suits for damages arising out of actions that involved the exercise of discretionary judgment. See *Spalding* v. *Vilas*, 161 U.S. 483, 498 (1896) ("In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages."). Thus aside from some government officials like prosecutors, judges, and legislators, who enjoy absolute immunity from suit for performing their assigned functions, see *Harlow* v. *Fitzgerald*, 457 U.S. 800, 807 (1982), government officers have traditionally been protected by a qualified immunity from suit. With regard to state-law tort actions, this Court held that federal employees are immune from suits arising out of actions that involved the employee's exercise of "discretionary" judgment. *Westfall* v. *Erwin*, 484 U.S. 292, 295-297 (1988).

The Court reasoned in *Westfall* that the limitation of official immunity to actions arising out of an employee's discretionary actions reflected a balance between the benefits and costs of insulating government employees from suit. Official immunity is intended not "to protect an erring official, but to insulate the decisionmaking process from the harassment of prospective litigation."

484 U.S. at 295. In particular, official immunity seeks to counter the possibility that "the threat of liability will make federal officials unduly timid in carrying out their official duties, and that effective government will be promoted if officials are freed of the costs of vexatious and often frivolous damages suits." *Ibid.*; see *Doe* v. *McMillan*, 412 U.S. 306, 319 (1973). Thus, the Court explained, "[i]t is only when officials exercise decisionmaking discretion that potential liability may shackle 'the fearless, vigorous, and effective administration of policies of government.'" *Westfall*, 484 U.S. at 297 (quoting *Barr* v. *Matteo*, 360 U.S. 564, 571 (1959) (opinion of Harlan, J.)).

Subsequently, in the Westfall Act, enacted in response to this Court's decision in *Westfall*, Congress expanded the immunity of federal employees beyond their performance of discretionary functions to cover all common-law tort suits for actions taken within the scope of the their employment. See 28 U.S.C. 2679. Congress instead provided for the substitution of the United States as the defendant under the FTCA, which, as recounted below, already contained an express discretionary function exception. 28 U.S.C. 2679(b)(1). When it enacted the Westfall Act, Congress also amended the TVA Act to provide a corresponding immunity for TVA employees, with the substitution of TVA as the defendant instead of the United States. 16 U.S.C. 831c-2.[4]

c. The scope of review of governmental action in suits for declaratory or injunctive relief has broadened since *Marbury* and *Kendall* under the Administrative

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[4] Before the Court's decision in *Westfall*, the Eleventh Circuit had held that TVA employees were protected by official immunity for their exercise of discretionary functions. See, *e.g.*, *Johns* v. *Pettibone*, 769 F.2d 724, 727-728 (1985).

Procedure Act, 5 U.S.C. 701 *et seq.*, especially as a result of the elimination of sovereign immunity in such suits in 1976. See Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721; 5 U.S.C. 702. But in the FTCA, enacted close in time to the enactment of the APA in 1946, Congress preserved immunity from damages actions in tort based on the performance of discretionary functions. Thus, in 1946, when Congress waived the government's sovereign immunity from suit for certain torts, see p. 5, *supra*, it codified the immunity for discretionary functions by barring "[a]ny claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a).

By enacting the discretionary function exception in the FTCA, Congress did not purport to alter its scope. And the FTCA's legislative history, on which this Court relied in *Dalehite*, indicates that Congress understood that the government would not have been subject to suit based on the exercise of discretionary functions even without an explicit statutory command. In *Dalehite*, a case that involved the explosion of ships carrying fertilizer that had been produced under the control of the United States, 346 U.S. at 18, this Court reviewed the historical background and legislative history specifically with respect to the discretionary function exception at length, *id.* at 24-30. The Court explained that the exception "was drafted as a clarifying amendment * * * to assure protection for the Government against tort liability for errors in administration or in the exercise of discretionary functions." *Id.* at 26-27.

The Court observed that "[a]n Assistant Attorney General, appearing before the Committee * * * [,] explained [the discretionary function exception] as avoiding 'any possibility that the act may be construed to authorize damage suits against the Government growing out of a legally authorized activity,' merely because 'the same conduct by a private individual would be tortious.'" *Dalehite*, 346 U.S. at 27 (quoting *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 33 (1942) (House Hearings). It was not "intended," Assistant Attorney General Shea explained, "that the * * * propriety of a discretionary administrative act should be tested through the medium of a damage suit for tort." *Ibid.* (citation omitted).

Referring to a prior bill that did not incorporate a discretionary function exception, the House Committee on the Judiciary was advised that "the cases embraced within [the new] subsection would have been exempted from [the prior bill] by judicial construction." *Dalehite*, 346 U.S. at 27 (quoting House Hearings 35) (brackets in original). "It is not probable," the committee was informed, "that the courts would extend a Tort Claims Act into the realm of the validity of * * * discretionary administrative action, but [the statutory exception] makes this specific." *Ibid.* (citation omitted).

In *Varig Airlines*, the Court reiterated that when Congress enacted the FTCA, it "believed that claims of the kind embraced by the discretionary function exception would have been exempted from the waiver of sovereign immunity by judicial construction," but the exception was nevertheless "added to make clear that the [FTCA] was not to be extended into the realm of the validity of * * * discretionary administrative action."

467 U.S. at 810. In other words, the discretionary function exception "merely makes explicit what would otherwise be implicit." *Sea-Land Serv., Inc.* v. *United States*, 919 F.2d 888, 891 (3d Cir. 1990) (citing *Varig Airlines*, 467 U.S. at 810), cert. denied, 500 U.S. 941 (1991); see *Gray* v. *Bell*, 712 F.2d 490, 509 (D.C. Cir. 1983) (FTCA's legislative history "reflects a congressional belief that courts would continue to apply preexisting common law doctrine barring claims against discretionary government acts"), cert. denied, 465 U.S. 1100 (1984). Shortly after the FTCA was enacted, the Eighth Circuit observed that Congress had adopted the discretionary function exception "in recognition of the separation of powers among the three branches of the government and the considerations of public policy which have moved the courts to refuse to interfere with the actions of officials at all levels of the executive branch who, acting within the scope of their authority, were required to exercise discretion or judgment." *Coates*, 181 F.2d at 818.

This Court's extensive review of the historical underpinnings of the FTCA's discretionary function exception establishes that its roots, grounded in the separation of powers and the need for protection of the exercise of judgment and discretion, long preexisted the FTCA. It was expected that this longstanding doctrine would not have been abrogated by the FTCA's general waiver of sovereign immunity for damages actions in tort against the government even without an express exception, but to remove any doubt, that doctrine (and its underlying principles) were codified in the FTCA's discretionary function exception. For the same reasons, it would have been expected that the general sue-and-be-sued clause in the TVA Act would be construed not

to waive sovereign immunity from damages actions for tort claims based on the performance of discretionary functions.

d. In other areas, this Court has adopted limiting constructions to preserve traditional immunities and protections of the federal government. In *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986), this Court held that a provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, making the United States' liability "the same as a private person" did not waive the government's sovereign immunity from interest payments, despite the statute's silence on the issue. 478 U.S. at 319-320. The Court noted that "[o]ther statutes placing the United States in the same position as a private party also have been read narrowly to preserve certain immunities that the United States has enjoyed historically." *Ibid.* Similarly, in *Feres* v. *United States*, 340 U.S. 135 (1950), this Court held that the broad waiver of sovereign immunity in the FTCA did not apply to claims by military personnel for service-related injuries. *Id.* at 146. This Court concluded that it could not "impute to Congress such a radical departure from established law in the absence of express congressional command." *Ibid.* And in *Lehman* v. *Nakshian*, 453 U.S. 156 (1981), the Court held that in amending the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, so as to bring the federal government within its scope, Congress did not grant a right to a jury trial to federal employees suing the government under that Act. 453 U.S. at 168-169. The Court required a "clear[] and unequivocal[]" statement before it would decide that Congress intended to abrogate the long settled rule that the Seventh Amendment right to a jury trial does

not apply in actions against the federal government. *Id.* at 162.

Similarly, a number of courts of appeals construing the SIAA have concluded that a waiver of the government's established immunity from tort suits based on the performance of discretionary functions "requires clear statutory expression." *Wiggins* v. *United States*, 799 F.2d 962, 965 (5th Cir. 1986); see *Sea-Land Serv.*, 919 F.2d at 891 ("Congress must speak with unmistakable intent in order to waive tort immunity for the government's discretionary functions."); *Gercey* v. *United States*, 540 F.2d 536, 539 (1st Cir. 1976) (declining, "in the absence of an express Congressional directive to the contrary," to construe the waiver of sovereign immunity set forth in the SIAA as providing federal courts with the power to review governmental policy decisions), cert. denied, 430 U.S. 954 (1977).

2. Courts have uniformly held, based on separation-of-powers principles, that the waiver of sovereign immunity contained in the SIAA does not extend to actions based on discretionary functions

In the same FTCA provision that exempts claims arising from activities of TVA from the FTCA's coverage, 28 U.S.C. 2680(*l*), Congress also provided that the FTCA "shall not apply" to "[a]ny claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States," 28 U.S.C. 2680(d). Instead, the United States has waived its immunity from claims covered by that Act—the Suits in Admiralty Act (SIAA)—through a provision that permits "a civil action in admiralty in personam" against the United States or a federally owned corporation in circumstances where a civil action in ad-

miralty could be maintained if a private person or property had been involved. 46 U.S.C. 30903(a). Although the SIAA's immunity waiver provision does not contain a discretionary function exception, every court of appeals to have considered the question has held that the waiver does not extend to suits based on the performance of such functions.[5]

Courts construing the SIAA have "understood *Varig* [*Airlines*] to teach that, as a matter of judicial construction, [courts] should not read a general waiver of sovereign immunity to include a waiver of immunity with respect to damage occasioned by policy decisions." *Sea-Land Serv.*, 919 F.2d at 891; see *McMellon* v. *United States*, 387 F.3d 329, 341 (4th Cir. 2004) (en banc) (Court's explanation of the FTCA exception in *Varig* "makes it clear that the exception is a statutory embodiment of separation-of-powers concerns."), cert. denied, 544 U.S. 974 (2005); *Canadian Trans. Co.* v. *United States*, 663 F.2d 1081, 1086 (D.C. Cir. 1980) ("Our recognition of a discretionary function exception

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[5] See *Gercey*, 540 F.2d at 539; *In re Joint E. & S. Dists. Asbestos Litig.*, 891 F.2d 31, 35 (2d Cir. 1989); *Sea-Land Serv.*, 919 F.2d at 891 (3d Cir.); *McMellon* v. *United States*, 387 F.3d 329, 338 (4th Cir. 2004) (en banc), cert. denied, 544 U.S. 974 (2005); *Baldassaro* v. *United States*, 64 F.3d 206, 208 (5th Cir. 1995), cert. denied, 517 U.S. 1207 (1996); *Wiggins*, 799 F.2d at 966; *Graves* v. *United States*, 872 F.2d 133, 137 (6th Cir. 1989); *Bearce* v. *United States*, 614 F.2d 556, 559-560 (7th Cir.), cert. denied, 449 U.S. 837 (1980); *Earles* v. *United States*, 935 F.2d 1028, 1031-1032 (9th Cir. 1991); *Tew* v. *United States*, 86 F.3d 1003, 1005 (10th Cir. 1996); *Drake Towing Co.* v. *Meisner Marine Constr. Co.*, 765 F.2d 1060, 1063-1064 (11th Cir. 1985), abrogated on other grounds by *Cranford* v. *United States*, 466 F.3d 955, 959 (11th Cir. 2006), cert. denied, 552 U.S. 810 (2007); *Canadian Transp. Co.* v. *United States*, 663 F.2d 1081, 1085-1086 (D.C. Cir. 1980).

in the [SIAA], * * * is not an attempt to rewrite the statute, but merely an acknowledgement of the limits of judicial power."). Those courts have recognized that courts must adhere to the doctrine of separation of powers "even in the absence of an explicit statutory command." *In re Joint E. & S. Dists. Asbestos Litig.*, 891 F.2d 31, 35 (2d Cir. 1989) (quoting *Canadian Trans.*, 663 F.2d at 1086).

Citing the concerns underlying the separation-of-powers rationale for the discretionary function exception, courts construing the SIAA have recognized that without reading the immunity waiver as inapplicable to discretionary functions, "all administrative and legislative decisions concerning the public interest in maritime matters" would be subjected "to independent judicial review in the not unlikely event that the implementation of those policy judgments were to cause private injuries." *Bearce* v. *United States*, 614 F.2d 556, 559 (7th Cir.), cert. denied, 449 U.S. 837 (1980); see *Gercey*, 540 F.2d at 539. Those courts have viewed such an outcome as "intolerable under our constitutional system of separation of powers." *In re Joint E. & S. Dists. Asbestos Litig.*, 891 F.2d at 35; accord *Wiggins*, 799 F.2d at 966 ("Without the implication of a discretionary functions exception in the [SIAA], every decision of a government official cognizable under that Act would be subject to a second-guessing by a court on the claim that the decision was negligent."); *Canadian Transp.*, 663 F.2d at 1085 ("[R]espect for the doctrine of separation of powers requires that in cases arising under the [SIAA], courts should refrain from passing judgment on the appropriateness of actions of the executive branch

which meet the requirements of the discretionary function exception of the FTCA.").[6]

3. Tort suits against TVA for damages arising from the agency's performance of discretionary functions would raise significant separation-of-powers concerns

The same separation-of-powers concerns that undergird immunity for performance of discretionary functions at common law and under the FTCA, and that have justified its recognition under the SIAA, are fully applicable to tort claims brought against TVA. Because tort suits seeking to hold TVA liable for injuries arising from the exercise of discretionary functions are "not consistent with the statutory or constitutional scheme," *Burr*, 309 U.S. at 245, the TVA Act's general waiver of immunity should likewise be construed not to extend to claims based on TVA's performance of discretionary functions. Otherwise, TVA's discretionary decisions in all aspects of its broad operations would be subjected to review in individual tort actions decided by courts any time those policy judgments were to cause private inju-

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[6] As the government explained in its brief in opposition to the petition for a writ of certiorari, petitioners' case properly falls under the SIAA's waiver of sovereign immunity, not the waiver of immunity in the TVA Act, because petitioners' claims fall within the district court's admiralty jurisdiction. Br. in Opp. 16-19. The SIAA waives sovereign immunity to suits in admiralty against the United States "or a federally-owned corporation" where such an action could be maintained if a private person were involved. 46 U.S.C. 30903(a). Where the SIAA applies, an action under it is "exclusive of any other action * * * against * * * the United States or the federally-owned corporation." 46 U.S.C. 30904. That exclusive remedy provision governs petitioners' suit. In the event of a remand to the district court, the TVA intends to assert immunity under the SIAA.

ries. That outcome is incompatible with our constitutional system of separation of powers. See *In re Joint E. & S. Dists. Asbestos Litig.*, 891 F.2d at 35.

a. Separation of powers concerns apply with full force to TVA, which is an Executive Branch "agency of the Federal Government," *Ashwander* v. *TVA*, 297 U.S. 288, 315 (1936), in addition to being "a wholly owned public corporation of the United States," *TVA* v. *Hill*, 437 U.S. 153, 157 (1978). TVA has a board of directors that is appointed by the President with the advice and consent of the Senate, 16 U.S.C. 831a(a)(1).[7] Congress has charged TVA with pursuing defined public purposes, 16 U.S.C. 831, and determined in some cases how TVA must prioritize those purposes, 16 U.S.C. 831h-1. TVA is vested with law enforcement authority, 16 U.S.C. 831c-3(a) and (b), and the power of eminent domain, 16 U.S.C. 831c(h); see *United States ex rel. TVA* v. *Welch*, 327 U.S. 546, 553 (1946) (holding that TVA's takings of land were for a public purpose under the Takings Clause). As President Roosevelt described his vision for TVA, it was to be "possessed of the flexibility of private enterprise" but "clothed with the power of government." H.R. Doc. 15, at 1.

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[7] Petitioners quote language (Br. 9, 19) from *Pierce* v. *United States*, 314 U.S. 306, 310 (1941), stating that the TVA is "a corporate entity, separate and distinct from the Federal Government itself." That language (from a declined jury instruction) pertained to whether, at the time, a criminal prohibition on impersonating officers of the United States extended to officers of government-owned corporations. *Ibid.* Congress later expressly extended the statute to government-owned corporations, *id.* at 310-311, and in any event the question is wholly tangential to the question whether civil tort suits based on the TVA's performance of discretionary functions implicate separation-of-powers concerns.

Petitioners err in suggesting (Br. 8-9, 19-21) that the TVA's corporate status obviates the concerns underlying the immunity from suit for discretionary functions. Congress took the opposite view, applying the discretionary function exception in the FTCA to "corporations primarily acting as instrumentalities or agencies of the United States." 28 U.S.C. 2671; see 28 U.S.C. 2680(a). Furthermore, the SIAA similarly extends to "federally-owned corporation[s]," 46 U.S.C. 30903, and as explained above, the courts of appeals have uniformly interpreted the immunity waiver in that statute not to extend to discretionary functions. Cf. *Department of Transp.* v. *Association of Am. R.Rs.*, 135 S. Ct. 1225, 1233 (2015) (holding that Amtrak, a federally owned corporation that is engaged in activities with commercial analogues, is a governmental entity for purposes of separation of powers).

b. Moreover, TVA has "broad responsibilities" throughout the Tennessee River valley—duties relating "to navigability, flood control, reforestation, marginal lands, and agricultural and industrial development of the whole Tennessee Valley"—that are not materially different from those of other government agencies. *Welch*, 327 U.S. at 553. For example, maintaining reservoir levels for flood control—an express part of the TVA's charge, 16 U.S.C. 831, and parallel to functions performed elsewhere by the U.S. Army Corps of Engineers (Corps)—is a quintessential discretionary function that Congress expected would be excepted from suit under the FTCA's discretionary function exception. See *Dalehite*, 346 U.S. at 29-30 (quoting H.R. Rep. No. 2245, 77th Cong., 2d Sess. 10 (1942) (H.R. Rep. No. 2245)) (describing the exception as "intended to preclude any possibility that the bill might be construed to

authorize suit for damages against the Government growing out of authorized activity, such as a flood-control or irrigation project").

In *McMellon*, the Fourth Circuit observed that permitting tort liability for the government's decision to build a dam in a particular location or otherwise change the course of a navigable waterway would be "problematic, to say the least," and the court recognized an implied discretionary function exception to the SIAA's immunity waiver as a result. 387 F.3d at 342. Building dams on the Tennessee River and changing the course of the waterway so that commercial navigation could be accomplished was a key responsibility of the TVA. 16 U.S.C. 831h-1; *TVA History* 10, 15-17. Under petitioners' reading of the TVA Act's sue-and-be-sued clause, TVA could be sued in tort for its decisions to build dams in certain locations or to release water from a reservoir for flood control. That reading of TVA's sue-and-be-sued clause is untenable.

Indeed, before the FTCA was enacted, a federal district court in Tennessee had determined that TVA could not be sued for actions taken for flood control or alterations to the course of the river. *Grant* v. *TVA*, 49 F. Supp. 564, 565-566 (E.D. Tenn. 1942). The court explained that TVA's sue-and-be-sued clause "is to be taken into consideration with the congressional purposes in creating this governmental corporation." *Id.* at 565. The court determined, based on "grounds of public policy," that TVA was not suable in tort for "damages arising in the development and maintenance of waters for purposes of navigation and flood control, including claims for negligence," notwithstanding its sue-and-be-

sued clause. *Id.* at 566;[8] see also *Adams* v. *Home Owners' Loan Corp.*, 107 F.2d 139, 141 (8th Cir. 1939) (holding that Home Owners Loan Corporation was not subject to individual tort claim for malicious prosecution under sue-and-be-sued clase, citing *Spalding*, *supra*).

Another federal district court reaffirmed the *Grant* court's conclusion in *Atchley* v. *TVA*, 69 F. Supp. 952 (N.D. Ala. 1947), shortly after Congress enacted the FTCA. The court explained that Congress could not have intended that TVA decisions about releasing water from reservoirs would be made by juries in tort actions, rather than by "the skilled and experienced engineers to whom this duty has been delegated." *Id.* at 935. The court stated: "[T]he present case comes clearly within the principle that the performance by executive officers of discretionary government duties entrusted to them by statute is not subject to judicial review," and the court noted that this principle had "recently been reaffirmed by Congress in the [FTCA]." *Id.* at 935 & n.4.

c. Tort suits challenging TVA's exercise of discretionary functions would raise the same concerns about "judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy" that historically undergirded protection for the exercise of judgment and discretion by government officials and that was the foundation for the preservation of immunity for discretionary functions in the FTCA. *Varig Airlines*, 467 U.S. at 814. TVA's control of the water level in a reservoir, for example, may

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[8] The court in *Grant* further stated that TVA would be suable in tort for damages arising from its activities "in the commercial field," including power generation. 49 F. Supp. at 566. That distinction between "governmental" and "commercial" activities has been undermined by this Court's cases. See pp. 39-40, *infra*.

require the exercise of policy judgment to balance potentially competing interests in navigation, recreation, and power generation. And judgments about the best way to warn boaters of an emergency in the water may require balancing of information about the efficacy of different forms of communication and the resources available.

Indeed, in many cases, TVA's actions will create benefits and burdens for different parties. If any aggrieved plaintiff could challenge those decisions through a tort action, judges would be placed in the position of second-guessing TVA's policy decisions and making judgments as to how best to balance competing societal values and interests. If the TVA Act's sue-and-be-sued clause were not read to preserve immunity for discretionary functions, "the executive branch's ability to 'faithfully execute[]' the law, U.S. Const., art. II § 3, would be substantially impaired." *McMellon*, 387 F.3d at 342 (brackets in original). As under the SIAA, "[a] failure to recognize *any* discretionary function exception would allow the deterrent effect of tort liability in those very areas where Congress has mandated an active executive role." *Id.* at 351 (Wilkinson, J., concurring). Consistent with separation-of-powers principles, the Court should read the TVA Act's general immunity waiver as not extending to suits based on TVA's performance of discretionary functions.

C. TVA's Immunity From Suit Based On Performance Of Discretionary Functions Is Necessary To Avoid Interference With Important Governmental Functions

For similar reasons, construing the TVA Act's sue-and-be-sued clause not to waive sovereign immunity for discretionary functions is appropriate under the second (and related) justification described in *Burr* because it

"is necessary to avoid grave interference with the performance of * * * governmental function[s]" that Congress has assigned to TVA. *Burr*, 309 U.S. 245.

In addition to the prevention of judicial second-guessing of executive policymaking decisions in damages actions, immunity for discretionary functions "protect[s] the Government from liability that would seriously handicap efficient government operations." *Varig Airlines*, 467 U.S. at 814 (citation omitted). "Without the implication of a discretionary functions exception," the government would constantly be subject to tort suits claiming that its policy decisions were negligent. *Wiggins*, 799 F.2d at 966. For the reasons stated above, such second-guessing would seriously interfere with TVA's ability to carry out the many duties that Congress has assigned to it.

In addressing this second category referred to in *Burr*, petitioners contend (Br. 29-31) that the TVA functions at issue in this case—constructing and maintaining electric power infrastructure, as well as emergency response—are not "governmental." That contention is mistaken. TVA is specifically authorized by Congress to produce and sell electric power at rates as low as feasible. 16 U.S.C. 831d(*l*), 831j, 831n-4(f). That mandate was critical to bring electricity to the Tennessee Valley's vast rural areas, *TVA History* 5, 9, 12, 45, and TVA's power operations "improve the economy of the area served by TVA power and promote the general welfare of the nation." *United States ex rel. TVA* v. *An Easement & Right-of-Way Over Two Tracts Of Land*, 246 F. Supp. 263, 269 (W.D. Ky. 1965), aff'd, 375 F.2d 120 (6th Cir. 1967) (per curiam). Congress specifically gave TVA the authority to "construct * * * transmis-

sion lines * * * in the Tennessee River and its tributaries, 16 U.S.C. 831c(j), and gave the agency eminent domain power to carry out these duties, 16 U.S.C. 831c(i).

Moreover, this Court recognized in *Ashwander*, *supra*, that TVA's furnishing of electric power, which here is accomplished by power transmission lines like the one that was being repaired in this case when the accident occurred, is an exercise of the government's authority under Article IV, § 3 of the Constitution to dispose of the property of the United States. 297 U.S. at 330 (observing with respect to generation of hydroelectric power that "[t]he power of falling water" is an inevitable result of the construction of a dam and the "electric energy thus produced[] constitute[s] property belonging to the United States"). Repairing the transmission line that enables the United States to dispose of its property is a means of accomplishing that constitutional objective and "raise[s] no different constitutional question." *Id.* at 339.

The construction, operation, and maintenance of electric power infrastructure is an important governmental function that is also carried out by other federal agencies. The Corps is the largest owner-operator of hydroelectric power plants in the United States and currently operates 356 hydroelectric generating units at 75 multipurpose reservoirs. U.S. Army Corps of Eng'rs, *StrongPoint* (Feb. 9, 2016);[9] see 16 U.S.C. 825s. And the Bureau of Reclamation operates 53 hydroelectric power plants and is the nation's second largest producer of hydroelectric power. Bureau of Reclamation,

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[9] Http://cdm16021.contentdm.oclc.org/utils/getfile/collection/p16021coll8/id/3498/filename/3498.pdf.

U.S. Dep't of the Interior, *Hydropower Program*.[10] Conducting patrols and emergency response on public lands and waters is also a quintessential governmental function. Petitioners allege in their complaint that TVA has significantly diminished its activities on that front in recent years, J.A. 24-25, ¶ 6, but that development does not alter the governmental nature of the activity.

More generally, this Court's precedent does not support petitioners' effort to parse the TVA's activities and treat as "commercial" or "non-governmental" any activity also performed by private entities. See, *e.g.*, Pet. Br. 30 ("[R]aising a power line is the work of an electrical contractor."). In *Dalehite*, the government conduct—the manufacture and shipping of fertilizer—could also have been carried out commercially by private entities. 346 U.S. at 19-23. This Court nonetheless found the FTCA's discretionary-function exception applicable, rejecting the dissent's argument that the discretionary function exception was inapplicable because the government was "carrying on activities indistinguishable from those performed by private persons," "akin to those of a private manufacturer, contractor, or shipper." *Id.* at 60 (Jackson, J., dissenting).

The Court has observed that "[l]egitimate activities of governments are sometimes classified as 'governmental' or 'proprietary,'" but the Court's "decisions have made it clear that the Federal Government performs no 'proprietary' functions. If the enabling Act is constitutional and if the instrumentality's activity is within the authority granted by the Act, a governmental function is being performed." *Federal Land Bank* v. *Board of Cnty. Comm'rs*, 368 U.S. 146, 150-151 (1961)

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[10] Http://www.usbr.gov/power/who/who.html (last updated Jan. 1, 2018).

(footnote omitted). The repairs being conducted by TVA to the power transmission line in this case were specifically authorized by Congress, and TVA was therefore engaged in a governmental function.

D. Petitioners' Arguments For Reading The TVA's Sue-And-Be-Sued Clause To Abrogate Immunity For Discretionary Functions Are Without Merit

1. Petitioners contend (Br. 13-16) that TVA is attempting to "engraft" the FTCA's discretionary function exception onto the TVA Act's sue-and-be-sued clause, even though Congress specifically excluded TVA from the FTCA. Pets. Br. 14 (citation omitted). In support of that argument, petitioners analogize this case to *Meyer*, *supra*. In *Meyer*, the Court determined that the FTCA was not the exclusive remedy for *constitutional* tort claims against the FDIC because Section 1346(b), the provision of the FTCA that confers jurisdiction and waives sovereign immunity, encompasses only state-law claims. 510 U.S. at 477 (citing 28 U.S.C. 1346(b) (2012 & Supp. 2017)). Because a constitutional tort claim is not cognizable under Section 1346(b), the Court explained that the FDIC's immunity from such claims must instead be assessed under its sue-and-be-sued clause. *Id.* at 479; see 12 U.S.C. 1725(c)(4) (1988). The FDIC argued that the scope of the immunity waiver in its sue-and-be-sued clause "should be limited to cases in which [the FDIC] would be subjected to liability as a private entity," which would make the agency immune from constitutional tort claims because "the Constitution generally does not restrict the conduct of private entities." *Meyer*, 510 U.S. at 480. The Court stated that, "[i]n essence," FDIC was asking the Court "to engraft a portion of * * * [Section] 1346(b)—liability 'under circumstances where the United States, if a private

person, would be liable to the claimant,' onto the sue-and-be-sued clause." *Ibid.* The Court rejected that argument and held that the FDIC's sue-and-be-sued clause waived the agency's sovereign immunity from the plaintiff's constitutional tort claim. *Id.* at 480-483.

In contrast to the FDIC's argument in *Meyer*, TVA does not ask the Court to "engraft" any portion of the FTCA onto the TVA Act's sue-and-be-sued clause. TVA's argument is instead based on this Court's recognition, long before enactment of the FTCA, of immunity from suit for discretionary functions grounded in separation-of-powers principles. See pp. 20-28, *supra*. The issue here is whether the principles that prompted recognition of that immunity (and its codification in the FTCA) warrant reading the TVA Act to preserve that immunity, notwithstanding the absence of an express exception to that effect. Nothing in the FTCA or the TVA Act suggests that TVA was uniquely outside of Congress's expectation that discretionary functions "would [be] exempted from the waiver of sovereign immunity by judicial construction," even if the exception had not been codified in the FTCA. *Varig Airlines*, 467 U.S. at 810. Indeed, as described above, see pp. 34-35, *supra*, some district courts had already read TVA's immunity waiver as subject to such an exception before the FTCA was enacted.

Nor would affirming the preservation of immunity for discretionary functions make the general waiver of immunity in the TVA Act "coextensive" with the FTCA. Pets. Br. 15-16. The FTCA contains a host of other provisions not present in the TVA Act's sue-and-be-sued clause—such as restrictions on settlement authority, an administrative exhaustion requirement, a two-year statute of limitations, and prohibitions on certain causes

of action. See, *e.g.*, 28 U.S.C. 2401(b), 2672, 2674-2675, 2680. Recognizing the inclusion of TVA under the immunity of federal agencies generally from suits based on discretionary functions, grounded in separation-of-powers principles that predated the TVA Act and the FTCA, would not mean that other limitations reflected in the FTCA must also apply to TVA.

The proposal to exclude TVA from the FTCA, which had been included in previous House versions of the bill, see H.R. Rep. No. 2245, at 11-12, was presented by Senator Hill of Alabama as a floor amendment to the Senate bill that was eventually enacted into law. Petitioner relies (Br. 21) on Senator Hill's floor statement, in which he stated that TVA had "t[aken] the place of private utility companies" in some locations in the Tennessee Valley, that the TVA Act permitted people to exercise rights against TVA exactly as they would have been against private companies, and that the FTCA should not interfere with any rights in the Tennessee Valley. 92 Cong. Rec. 6563-6564 (1946). It is not clear what rights Senator Hill had in mind, but there is no reason to think that in enacting the FTCA, Congress uniquely wanted TVA to be subject to damages in tort for the exercise of discretionary functions, especially in light of the *Grant* case, which had been decided in 1942, recognizing discretionary function immunity for TVA. See pp. 34-35, *supra*. The exclusion of TVA could have been motivated by any of the myriad procedural and other provisions in the FTCA. See also *Atchley*, 69 F. Supp. at 955 n.4 (stating that "TVA was exempted from the provisions of the [FTCA] at its own request on the ground that it was already subject to suit and certain of the procedural aspects of the Act would be burdensome.").

2. Petitioners further contend (Pets. Br. 18-19, 35-37) that recognizing immunity for discretionary functions would contravene congressional intent and Congress's "absolute" power to dictate waivers sovereign immunity. That argument is incorrect.

As this Court explained in *People of Porto Rico*, a grant of consent for an agency "to sue and be sued" does not mean that Congress intended an absolute waiver of the government's sovereign immunity. Those words must "be construed with reference to the powers conferred by the provisions to which they relate." 227 U.S. at 275, 277. Indeed, in *People of Porto Rico*, the Court construed the quoted clause not to waive the government's sovereign immunity from suit generally, absent its consent. Moreover, the entire premise of *Burr* and its progeny is that recognizing limitations on such waivers is sometimes appropriate. Judicial construction of statutes in that manner does not contravene congressional authority.

The question here is whether Congress did intend to subject TVA to tort claims for the activities of its employees engaged in discretionary functions by including a general sue-and-be-sued clause in the agency's organic statute. The history of the discretionary-function exception, the TVA Act, and the FTCA all support the conclusion that Congress would have expected TVA to be able to assert an immunity from such claims. When Congress enacted the FTCA—which covered both government-owned corporations and sue-and-be-sued entities—it expected that discretionary functions "would [be] exempted from the waiver of sovereign immunity by judicial construction" even absent an express exception. *Varig Airlines*, 467 U.S. at 810. Although the FTCA excluded TVA from its coverage, Congress

would have had no reason to expect courts to treat TVA differently from other government-owned corporations in that respect. With respect to TVA, like the sue-and-be-sued agencies covered by the FTCA, Congress would have expected the application of immunity for discretionary functions to continue. See *Dalehite*, 346 U.S. at 26 (discretionary function exception in FTCA was a mere "clarifying amendment"); H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945) ("[T]he bill does not affect the existing liability of [the TVA] to be sued in tort."); cf. *McMellon*, 387 F.3d at 350 (Wilkinson, J., concurring) (subjecting every discretionary act to the prospect of tort liability under the SIAA "would wrongly assign to Congress the desire to debilitate the executive branch").

Congress gave no indication in the TVA Act that it meant to waive the United States' sovereign immunity from suits arising from the performance of discretionary functions, and the Court should not presume that Congress intended to do so. The court of appeals' correctly held that the general waiver of immunity in TVA's organic act does not extend to actions in tort based on the performance of discretionary functions.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOSEPH H. HUNT
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ANN O'CONNELL ADAMS
Assistant to the Solicitor General
MARK B. STERN
WEILI J. SHAW
Attorneys

SHERRY A. QUIRK
General Counsel
DAVID D. AYLIFFE
Associate General Counsel
JAMES S. CHASE
Senior Attorney
Tennessee Valley Authority

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No. 17-1201

In The
Supreme Court of the United States

GARY THACKER and
VENIDA L. THACKER,
Petitioners,

v.

TENNESSEE VALLEY AUTHORITY,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

Franklin Taylor Rouse
Counsel of Record
Craig N. Rosler
Kenneth Bridges Cole, Jr.
Gary Vestal Conchin
CONCHIN, CLOUD & COLE, LLC
2404 Commerce Court, S.W.
Huntsville, Alabama 35801
(256) 705-7777
taylor@conchincloudcole.com

Counsel for Petitioners

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ARGUMENT

1. Overarching Points

1.1 Shifting the Issue

The TVA has subtly recast the question that this Court accepted. That question asked whether the lower courts "err[ed] by using an FTCA-derived 'discretionary-function exception,' rather than [*Fed. Housing Admin. v. Burr*, 309 U.S. 242 (1940)], to immunize the TVA from the [Thackers'] claims."[1] The Court did not revise that question.[2] The TVA now reframes and more broadly states the issue thus: "[W]hether the waiver of sovereign immunity in TVA's sue-and-be-sued clause is subject to a discretionary-function exception."[3] This change has at least two notable effects.

First, this reframing lets the TVA ask directly whether the separation of powers demands that it enjoy discretionary-function immunity — whatever this Court's existing precedent and whatever the statutory framework.[4] The accepted question, though, asks which of two tests governs whatever vestigial immunity the TVA does have. The importance of keeping that correct question in mind becomes

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[1] *See* Pet. i.

[2] *See Thacker v. TVA*, No. 17-1201 (U.S. Sept. 27, 2018) (granting review); *Thacker v. TVA*, No. 17-1201 (U.S. Sept. 28, 2018) (limiting review to first issue).

[3] TVA Br. 11.

[4] *See, e.g.*, TVA Br. 13, 24 ("even without an explicit statutory command").

apparent when we recognize (*see infra*, Part 1.3) that *Burr already anticipates* both the separation of powers, and immunity for truly higher-level, "policy"-laden work. The contested issue thus returns to whether the TVA has given good reason for abandoning the longstanding *Burr–Loeffler–Meyer* test in preference of a more vaguely stated discretionary-function analysis.

Furthermore, by shifting the inquiry, the TVA effectively concedes that the Eleventh Circuit's precise analysis cannot be supported. That court did not draw a discretionary-function exception from foundational separation-of-powers principles. It looked to the FTCA, specifically, and transposed its discretionary-function test to the TVA's sue-and-be-sued clause.[5] And both lower courts ignored the nearly 80-year-old framework that this Court has described in *Burr—Loeffler–Meyer*. They also took an approach that *Meyer* squarely rejected.

(The TVA insists in this vein that it is not "attempting to engraft the FTCA's discretionary function exception onto" its sue-and-be-sued clause.[6] Whatever else this assertion is meant to achieve, it seems an attempt to sidestep *Meyer*. For, in *Meyer*, this Court unanimously declined to borrow FTCA rules to expand the immunity of the sue-and-be-sued Federal Savings and Loan Insurance Corporation (FSLIC).[7] In any case, the TVA errs. It is not even

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[5] *Thacker v. TVA*, 868 F.3d 979, 981–83 (11th Cir. 2017) (Pet. App. 6a-9a).

[6] TVA Br. 14; *accord id.* at 40–41.

[7] *FDIC v. Meyer*, 510 U.S. 471, 480–83 (1994).

clear that the TVA's current analysis avoids "engrafting" from the FTCA; it is certainly not true of the Eleventh Circuit's decision. Again, that decision overtly invoked and used the "same [discretionary-function] test" as applies under the FTCA.[8])

* * *

The question before the Court is not simply "whether Congress intended to subject TVA to liability" for harm caused by its (supposedly) "discretionary" work.[9] That already avoids too much, and loads the analysis in the TVA's favor. The precise question is whether a discretionary-function test, modeled on the FTCA, displaces *Burr–Loeffler–Meyer*. Hewing to that question acknowledges the exact content of the ruling below; accounts for all the TVA's substantive concerns; and yields a conclusion that — along with carrying better practical results — stays faithful to the Constitution, statutes, and precedent.

1.2 The Conduct in Question

It is crucial to recall the specific conduct in question. Much of the TVA's argument depends, rhetorically and doctrinally, on invoking "broad responsibilities,"[10] powers, and conduct that this case does not involve. This case does not involve "eminent domain,"[11] for example, "maintaining reservoir levels

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[8] *See Thacker*, 868 F.3d at 982 (Pet. App. 6a).

[9] *See* TVA Br. 16.

[10] *Id.* at 2.

[11] *Id.* at 4, 10.

for flood control,"[12] or "chang[ing] the course of a navigable waterway."[13] It does not involve "planning for the proper use, conservation, and development of the natural resources of the Tennessee River . . . for the general social and economic welfare of the nation."[14] The Thackers do not challenge the TVA's "social, economic, and political"[15] "policy judgments"[16] in any meaningful sense of those terms. Nothing here questions the TVA's "decisions . . . as to how best to balance competing societal values and interests."[17] And it is hyperbole to suggest that holding the TVA responsible for the harm that it caused the Thackers would "shackle 'the fearless, vigorous, and effective administration of policies of government.'"[18]

These items are perhaps meant to evoke the heft and imperviousness of sovereign government — but they have nothing to do with this case.

What this case does involve, what the TVA was initially doing, is simply "replacing an overhead

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[12] *Id.* at 33; *accord id.* at 2, 34–35.

[13] *Id.* at 34.

[14] *Id.* at 2.

[15] *Id.* at 35.

[16] *Id.* at 31, 36.

[17] *Id.* at 36; *accord id.* at 13.

[18] *Id.* at 23 (quoting *Westfall v. Erwin*, 484 U.S. 292, 297 (1988) (quoting in turn *Barr v. Mateo*, 360 U.S. 564, 571 (1959)). It is equally excessive when the TVA states: "The repairs being conducted by TVA to the power transmission line in this case were specifically authorized by Congress . . . ." (TVA Br. 40.) That is obviously not so. Authorization is one thing, moreover, while impunity is another entirely.

conductor on a [power-]transmission line."[19] Or, more germanely, safely raising a dropped power line.

1.3 *Burr* Already Contemplates Immunity for "Policy"-Laden, "Governmental" Work

It is hard to overstate the importance of the next point. Which is simply this: *Burr–Loeffler–Meyer already contemplates potential immunity* for the higher-level, truly "policy"-laden work that the TVA is concerned to protect.

Specifically, *Burr* provides that "an implied restriction of the general authority" to sue and be sued may be "necessary to avoid grave interference with the performance of a governmental function."[20] And the TVA now argues that its "policy"-level work is immune under *Burr's* "governmental function" prong.[21]

Equally critical, in laying out its test, *Burr* accounted for the separation of powers. The Court there reasoned: "Congress has full power to endow the Federal Housing Administration with the government's immunity from suit or to determine the extent to which it may be subjected to the judicial process."[22]

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[19] TVA Br. 6.

[20] *Burr*, 309 U.S. at 245.

[21] *See* TVA Br. 36–40.

[22] *Burr*, 309 U.S. at 244.

This alone largely deflates the TVA's position. The TVA insists that its broadest mandate requires the freedom to make "policy" judgments unbothered by the "second-guessing" of courts and juries. That curtailing that freedom insults the separation of powers. *But* Burr *already accounts for the TVA's concerns*. It anticipates that such conduct can be immune. And it does so in full view of the constitutional allocation of powers. What, then, remains of the TVA's grievance? Only that it dislikes the stricter rule of *Burr–Loeffler–Meyer*.

* * *

Even accepting at face value all that the TVA says, in the end, the heart of its analysis retains something of raw diktat. "Not this test, *that* test." The TVA then contrives a well-written but finally *post hoc* and tendentious justification for displacing existing precedent and inferentially overwriting statutes. The TVA ultimately gives no convincing reason for abandoning *Burr–Loeffler–Meyer* for a more generally defined (and hence, in practice, presumably broader) discretionary-function immunity.

2. Separation of Powers

The TVA's core argument remains that, whatever statutes might expressly say, its discretionary functions are impliedly immune under separation-of-powers principles. The TVA also now argues that it satisfies the first and second heads of *Burr*. That is, in the TVA's view, because compelling it to answer for its (supposedly discretionary) work here would violate the separation of powers, allowing

the Thackers' lawsuit is "not consistent with the . . . constitutional scheme."[23] The TVA also argues that the Thackers' lawsuit would "interfer[e] with the performance of a governmental function."[24]

2.1 The Lower Courts Did Not Address *Burr*

The TVA did not try to prove in the lower courts that it satisfied *Burr*. (The Thackers pointed this out in their initial petition to this Court.[25]) The district court made no findings, offered no analysis, and reached no conclusions under *Burr*.[26] The Eleventh Circuit did not discuss *Burr*.[27] The TVA thus did not "clearly show," for instance, that dismissing the Thackers' suit was "necessary" to avoid "grave interference" with a "governmental function." Those are all requisites under *Burr's* second prong; but there is no record decision on any of these points for this Court to review.

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[23] TVA Br. 19.

[24] *Id.* at 36–40.

[25] Pet. 17–18.

[26] *See Thacker v. TVA*, 188 F. Supp. 3d 1243 (N.D. Ala. 2016) (Pet. App. 12a-16a).

[27] The Eleventh Circuit cited *Burr*, and *Loeffler v. Frank*, 486 U.S. 549 (1988), for the basic idea that "'sue-and-be-sued' waivers are liberally construed," but did not otherwise mention, much less analyze under, those cases. *See Thacker*, 868 F.3d at 981–83.

2.2 Separation of Powers

The TVA's separation-of-powers argument fails to persuade. The TVA writes: "There is no indication that Congress intended to subject TVA to liability for the performance of discretionary functions."[28] The TVA's argument is generally a sustained exercise in inferring a desired conclusion from what is *not* in the statutes and most pertinent case law, in the teeth of what *is*.

Rather than inferring from what Congress and this Court have not done, and imagining what they must have nonetheless "intended,"[29] we might better revisit the actual content of the statutes and case law. There is, *pace* the TVA, every indication that Congress has subjected it to garden-variety tort suits like this one.

Above all, Congress has nowhere provided the TVA with discretionary-function immunity. The FTCA, and its discretionary-function test, does not govern the TVA. (On the conclusive effect of which, one need look only to *Meyer*.) The TVA Act states that the TVA's sue-and-be-sued immunity waiver is limited only by other parts of that Act.[30] None applies here. None "specifically provide[s]"[31] — or hints at —

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[28] TVA Br. 16, 44.

[29] *E.g.*, *id.* at 15–16, 19, 44.

[30] "Except as otherwise *specifically provided* in this chapter [the Tennessee Valley Authority Act of 1933], the [TVA] . . . [m]ay sue and be sued in its corporate name." 16 U.S.C. § 831c(b) (Pet. App. 18a) (emphasis added).

[31] *See id.*

a discretionary-function test that limits the TVA's suability. (Which puts paid to the TVA's contention that this Court "should not presume" that the TVA Act "intended" to waive immunity for discretionary functions.[32] Had Congress wanted to append a discretionary-function exception to the TVA's sue-and-be-sued clause, after all, it could have done so expressly.) This Court moreover has explained how to test sue-and-be-sued immunity since at least 1940's *Burr*. Congress is presumed to know settled law.[33] Yet Congress has not stepped in to repudiate or revise that precedent.

Legislative history confirms that Congress expressly intended the TVA's immunity waiver to have no restrictions. The Conference Report on the bill that would become the TVA Act stated: "The House bill *placed no limitations whatever upon the suability of the [TVA]*, so that all persons who had a cause of action against the [TVA] might have their day in court."[34] A Senate amendment tried to limit the TVA's suability "solely to suits for the enforcement of contracts and the defense of property," but the "no limitations" House version "was written into the conference amendment in the interest of justice."[35]

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[32] *See* TVA Br. 44.

[33] *See generally, e.g., Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 993 (2005) (noting presumption that Congress is aware of "settled" judicial statutory interpretations).

[34] H.R. Rep. No. 130, 73d Cong., 1st Sess. at 16 (1933) (emphasis added).

[35] *Id.* at 16, 25.

Thus, Congress openly contemplated that the TVA could be liable in tort, and that nothing in the TVA Act limited the intended immunity waiver. As Representative Goss explained: "The bill creates a corporation labeled 'Tennessee Valley Authority . . . .' It is permitted . . . to sue and be sued *as would any private corporation* . . . ."[36] It is therefore certain that Congress had no "plain[] . . . purpose" to "use the 'sue and be sued' clause in a narrow sense."[37]

The FTCA's legislative history shows that Congress never intended for that Act to affect the then-existing suability of the TVA. A House Report explained: "This [bill] does not apply to the Tennessee Valley Authority, which is excluded from the bill, and therefore the bill *does not affect the existing liability of that agency to be sued in tort.*"[38]

All this cannot be lightly brushed off. "Congress' power over federal jurisdiction" is itself "an essential ingredient of separation and equilibration of powers."[39] Its "absolute" power to define that jurisdiction,[40] and to shape the limits of sovereign immunity, is at least as venerable as the TVA believes an implied discretionary-function

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[36] 77 Cong. Rec. 2252 (1933) (statement of Rep. Edward W. Goss) (emphasis added).

[37] *Burr*, 309 U.S. at 245.

[38] H.R. Rep. No. 1287, 79th Cong., 1st Sess. at 6 (1945) (emphasis added).

[39] *Patchak v. Zinke*, 138 S. Ct. 897, 907 (2018) (quoting *Steel Co. v. Citizens for Better Environment*, 523 U. S. 83, 94–95 (1998)).

[40] *Schillinger v. United States*, 155 U.S. 163, 166 (1894).

immunity to be.[41] No one denies that Congress has granted the courts jurisdiction over claims against the TVA. And this Court has said: "[J]udicial duty is not less fitly performed by declining ungranted jurisdiction *than in exercising firmly that which the Constitution and the laws confer.*"[42]

* * *

It is ultimately less than convincing to suggest that holding an essentially commercial power company liable for mishandling a power line somehow involves the judiciary overstepping its organic limits, and interfering with Article II power, in a way that endangers the basic structure of the government. The TVA's separation-of-powers argument fails to persuade.

2.3 Additional Replies

2.3.1 *Meyer* rejected "coextensive" immunities

The TVA disagrees with part of *Meyer's* operative reasoning. In *Meyer*, a unanimous Court declined to, "[i]n essence, . . . engraft language" from

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[41] *See Cary v. Curtis*, 44 U.S. 236, 245 (1845) ("[T]he judicial power of the United States . . . is (except in enumerated instances, applicable exclusively to this court) dependent . . . entirely upon the action of Congress . . . ."); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 331 (1816) (Congress "might parcel out the jurisdiction among such [inferior federal] courts, from time to time, at their own pleasure.").

[42] *See Patchak*, 138 S. Ct. at 907 (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 515 (1869)) (emphasis added).

the FTCA "onto the [FSLIC's] sue-and-be-sued clause" to diminish the scope of that clause's immunity waiver.[43] The Court reasoned that doing so "would render coextensive the scope of the waivers contained in § 1346(b) [of the FTCA] and sue-and-be-sued clauses generally."[44] The Court refused to presume that Congress intended that result — particularly given the content of the relevant statutes: "Had Congress wished to achieve that outcome, it surely would not have employed the language it did in [28 U.S.C.] § 2679(a)."[45]

The TVA finds *Meyer* mistaken. It writes:

> Nor would affirming the preservation of immunity for discretionary functions make the general waiver of immunity in the TVA Act "coextensive" with the FTCA. Pets. Br. 15-16. The FTCA contains a host of other provisions not present in the TVA Act's sue-and-be-sued clause — such as restrictions on settlement authority, an administrative exhaustion requirement, a two-year statute of limitations, and prohibitions on certain causes of action.[46]

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[43] *See Meyer*, 510 U.S. at 480, 483.

[44] *Id.* at 483.

[45] *Id.*

[46] TVA Br. 41–42.

Implying a discretionary-function immunity into the TVA's sue-and-be-sued clause, the TVA continues, "would not mean that [these] other limitations reflected in the FTCA must also apply to TVA."[47]

Three replies jump to mind. First, it was not the Thackers but this Court which held that judicially appending an FTCA suability rule to a sue-and-be-sued clause would make those two immunity rules unacceptably "coextensive" — in a way that Congress could not have intended, given the laws it had actually passed. Second, when *Meyer* was decided in 1994, the FTCA contained a "host of other provisions" that, according to the TVA, would keep FTCA-based and sue-be-sued immunity from becoming effectively equivalent.[48] Yet, without regard to those "other provisions," the *Meyer* Court found that tacking an FTCA rule onto a sue-and-be-sued clause would make the two immunities unacceptably "coextensive." Third, it is plainly true that extending the FTCA's discretionary-function test to the TVA "would not mean" that the rest of the FTCA "also applied" to the TVA. But it *would* reduce the TVA's sue-and-be-sued waiver to the "same [FTCA discretionary-function] test" — and, in that critical respect, would conflate discretionary-function immunity with sue-and-be-sued law and render the two rules "coextensive."[49]

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[47] *Id.* at 42.

[48] *See* 28 U.S.C. §§ 2401(b) (limitation), 2672 (settlements), 2674 (no punitives), 2680 (exceptions).

[49] The FTCA's discretionary-function exception is not gathered from various places across the FTCA; it lives in one specific paragraph: 28 U.S.C. § 2680(a).

Here, as in *Meyer*, Congress has "expressly set out how"[50] the TVA's sue-and-be-sued clause could be modified. Namely, by adjustments "specifically provided" elsewhere in the TVA Act[51] — but, again, no other part of the TVA Act adjusts the TVA's amenability to suit, to say nothing of adopting discretionary-function immunity. The TVA proves more willing than this Court to divine congressional intent in the teeth of, and to draw rules that run directly against, the content of the laws that Congress actually passed.

2.3.2 *Dalehite and Varig Airlines*

Two strands of the TVA's approach come together in its discussion of *Dalehite v. United States*, 346 U.S. 15 (1953) and *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense* (*Varig Airlines*), 467 U.S. 797 (1984).[52] The first is the TVA's willingness to draw helpful rules from an FTCA that expressly excludes it. (Though the TVA now uses more indirect reasoning to invoke the FTCA.) The second is its capacity to divine congressional intent, and then to extract rules, despite the content of the laws that Congress actually enacted. Whatever Congress did, the TVA knows better what it "intended," and, on the strength of that superior understanding, claims an immunity beyond anything that Congress has provided.

The TVA writes:

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[50] *Meyer*, 510 U.S. at 483.

[51] 16 U.S.C. § 831c(b) (Pet. App. 18a).

[52] TVA Br. 24–25.

> [T]he FTCA's legislative history, on which this Court relied in *Dalehite*, indicates that Congress understood that the government would not have been subject to suit based on the exercise of discretionary functions even without an explicit statutory command. . . . The Court explained that the exception "was drafted as a clarifying amendment . . . to assure protection for the Government against tort liability for errors . . . in the exercise of discretionary functions." [*Dalehite*, 346 U.S.] at 26-27.
>
> . . . .
>
> In *Varig Airlines*, the Court reiterated that . . . the [same] exception was . . . "added to make clear that the [FTCA] was not to be extended into the realm of the validity of . . . discretionary administrative action." 467 U.S. at 810. In other words, the discretionary function exception "merely makes explicit what would otherwise be implicit." *Sea-Land*, [919 F.2d at 891] (citing *Varig Airlines*, 467 U.S. at 810), cert. denied, 500 U.S. 941 (1991) . . . .[53]

The TVA's point, of course, is that discretionary-function immunity is implicit to the law, regardless of what statutes say — and despite what this Court has said about how to analyze sue-

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[53] *Id.* at 24–26.

and-be-sued clauses. But *Dalehite* and *Varig Airlines* do not support the TVA's conclusion.

First, these cases unfold entirely inside the FTCA. They say nothing about entities outside the FTCA — entities, indeed, that the FTCA expressly excludes. They say nothing about entities (like the TVA) whose organic law restricts suability only as is "specifically provided" in that organic law. They do not "clarify[]" or change anything in the TVA Act. Even at its bedrock — that is, even accepting all that the TVA says about the importance of shielding truly "discretionary" work — the TVA's analysis still does not account for the fact that *Burr already permits immunity* for truly "governmental," "policy"-level work.[54] So that, in the end, the TVA's free-ranging, inferential analysis gives no compelling ground for abandoning a *Burr-Loeffler–Meyer* rule that stays faithful to the express statutory framework.

Second, the on-the-ground work involved here is not the sort of conduct that *Dalehite* and *Varig Airlines* considered. The challenged (and ultimately immune) conduct in *Dalehite* involved a "cabinet-level decision to institute . . . [an] export program," and the "drafting of the basic plan of manufacture" for the product in question (both growing from the country's post-war "obligations as an occupying power").[55] The challenged work in *Varig Airlines* was the "licensing"

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[54] *See Varig Airlines*, 467 U.S. at 811 ("governmental," "policy"); *Dalehite*, 346 U.S. at 36 ("Where there is room for policy judgment and decision there is discretion.").

[55] *See Varig Airlines*, 467 U.S. at 810–11; *Dalehite*, 346 U.S. at 18–21.

of certain types of aircraft, which is quintessentially "regulatory."[56] In both cases the work embodied "policy judgments."[57] Work of that sort fell within the FTCA's discretionary-function exception.

Finally, in reviewing "the FTCA's legislative history,"[58] *Varig Airlines* discussed the FTCA's discretionary-function exception and then — quoting the same congressional report that the TVA invokes here — confirmed: "On the other hand, *the common law torts* of employees of . . . all . . . Federal agencies . . . would be included within the scope of" the FTCA's immunity waiver.[59]

2.3.3 *Porto Rico*

The TVA finds support for its implicit-immunity argument in *Porto Rico v. Rosales y Castillo*, 227 U.S. 270 (1913).[60] That case, the TVA says, shows that a sue-and-be-sued clause "does not mean that Congress intended an absolute waiver" of sovereign immunity; and that "[t]his Court has long recognized that such waivers . . . are subject to implied limitations in appropriate cases."[61] Thus, the

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[56] *See id.* 809–10, 813–15.

[57] *Id.* at 811, 820.

[58] TVA Br. 24.

[59] *See Varig Airlines*, 467 U.S. at 809–10 and n.9 (quoting Hearings on H. R. 5373 and H. R. 6463 before the House Committee on the Judiciary, 77th Cong., 2d Sess., 28, 33 (1942) (statement of Assistant Attorney General Shea)) (emphasis added).

[60] TVA Br. 17, 18, 43.

[61] *Id.* at 17 ("implied"), 43 ("absolute").

Porto Rico Court "construed" a sue-and-be-sued clause "not to waive the government's immunity from suit generally, absent its consent."[62]

Porto Rico does not advance the TVA's position. Above all else, the defendant in *Porto Rico*, the entity whose sovereign immunity was in question, was "the Government of the Island."[63] The full-blown sovereign, "endowed" with "legislative, judicial, and executive" power.[64] The "body politic."[65] The "Government of the Island" in *Porto Rico* is thus analogous to a State or to the United States itself. Indeed, the *Porto Rico* Court compared the defendant Government to those of the "organized Territories" and, specifically, to Hawaii.[66] The TVA is plainly not analogous to an integral, apex sovereign. The *Porto Rico* Court moreover *expressly distinguished* between sue-and-be-sued clauses, when used in a "grant of corporate existence" (as with the TVA), and when used in the organic law of a sovereign (which *Porto Rico* involved).[67]

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[62] *Id.* at 43.

[63] *Porto Rico*, 227 U.S. at 273.

[64] *Id.*

[65] *Id.* at 275.

[66] *Id.* at 273–74.

[67] *See Porto Rico*, 227 U.S. at 275 ("[T]he words to sue and be sued are . . . [an] expression . . . for . . . stating the right . . . which springs from a grant of corporate existence . . . . But *this does not solve the question here arising*, which is the meaning of the words in the [organic] act under consideration, for . . . words may have one significance in one context and a different signification in another.") (emphasis added).

Furthermore, no one has argued that sue-and-be-sued clauses yield immunity waivers that are "absolute" and without "implied limitation[]." The Thackers have argued only that sue-and-be-sued waivers are tested under *Burr*. Which of course recognizes "implied limitations." (The TVA says that the "entire premise of *Burr*" is "recognizing that limitations on [immunity] waivers" are "sometimes appropriate."[68] That is *a* premise of *Burr*. It is telling that the TVA accepts *Burr's* "entire premise" — while scuttling or squirming around its explicit analysis and requirements.)

Finally, *Porto Rico* predates *Burr* by 27 years. (And *Loeffler* and *Meyer* by generations.) *Porto Rico* does not override or contradict those later decisions; and, finally, says nothing about how to test the suability of an entity like the TVA.

2.3.4 The uniquely independent TVA has sued the Government

When it suits it, the TVA considers itself separate enough from Executive power. For example, the TVA has sued the Department of Energy for (essentially) breach of contract.[69] Normally, Executive agencies cannot sue one another; there is insufficient adversity, and hence no justiciable

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[68] TVA Br. 43.

[69] *TVA v. United States*, 13 Cl. Ct. 692, 693–95 (1987); *Dean v. Herrington*, 668 F. Supp. 646, 653 (E.D. Tenn. 1987). These decisions reflect the same TVA lawsuit, before (*Dean*) and after (*TVA*) an inter-court transfer.

controversy.[70] With the TVA, though, courts have reasoned that TVA's "unique independence" and "separate corporate" nature distance it from defendant Executive agencies, yielding "concrete adversity" and justiciable disputes.[71] The Eleventh Circuit reviewed such cases in 2002 and found a justiciable controversy between the TVA and the EPA.[72]

3. Miscellaneous Replies

3.1 "Governmental" and "Private" Conduct — Misreading Our Position

The TVA knocks over a straw man when it writes:

> Under petitioners' reading of the TVA Act's sue-and-be-sued clause, TVA could be sued in tort for its decisions to build dams in certain locations or to release water from a reservoir for flood control. That reading of TVA's sue-and-be-sued clause is untenable.[73]

We take no position on whether the TVA could be immune for these activities. The present inquiry does not require us to. Those things may well constitute "governmental functions" under *Burr*. And

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[70] *See TVA v. EPA*, 278 F.3d 1184, 1193–98 (11th Cir. 2002) ("general rule of non-justiciability").

[71] *See id.* at 1196–97 (discussing cases).

[72] *Id.* at 1193–98.

[73] "TVA Br. 14."

it may prove "clearly . . . necessary" to disallow certain suits that would "gravely interfere" with such functions. *Burr* would then immunize such work. But that is not this case. Those sorts of acts are not involved here. More to the point, invoking them gives no reason for overturning *Burr–Loeffler–Meyer* for a discretionary-function test that the TVA presumably thinks will yield more congenial results.

The TVA also misreads the Thackers' argument. We do not "contend" that "maintaining electric power infrastructure, as well as emergency response" are "not governmental activities."[74] They can be, and under *Burr*, in some cases they may be immune. What we argued was more specific. We said:

> [I]t is also true that the TVA "regularly exercises" non-governmental, *commercial* functions. And the TVA conduct *that is at issue here* — power generation, and *specifically the work of safely raising power lines* — is very much commercial. . . . *Even more exactly, its work in raising a power line* is the work of an electrical contractor. There is nothing significantly "governmental" in that.[75]

Maybe our point is better put like this: Not every aspect of the TVA's power business (even "maintaining . . . infrastructure") is so distinctly "discretionary" or "governmental" as to warrant

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[74] *Id.* at 14, 37.

[75] Thacker Br. 29–30 (some emphasis added).

immunity. So, too, not everything that can be called "emergency response" can be deemed "governmental."[76]

Nor do the Thackers mean to call "non-governmental" "any activity that is also performed by private entities."[77] We indeed said that "raising a power line is the work of an electrical contractor."[78] But the operative point is not that such work is open to suit because it could be done privately. Anything might be done privately (say, by a government contractor), and yet so involve the weighing of "social, economic, and political policy," the balancing of "competing societal values and interests," and so on, as to sometimes be "governmental" within the meaning of *Burr*. Our point is simply that safely raising a power line is the on-the-ground work of any ordinary electrical contractor, which involves no truly "discretionary," "policy"-level, or (in *Burr's* terms) "governmental" work. Unless those words are to be drained of useful meaning.

* * *

The critical point is that "an implied restriction of the general authority" to sue-and-be-sued — to immunize the TVA for its conduct here — is *not* "necessary to avoid grave interference" with the TVA's power-generation business. It can produce power tomorrow in the same way it has done for the

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[76] Which is apart from the circularity that plagues the TVA's "emergency response" argument.

[77] *See* TVA Br. 39.

[78] Thacker Br. 30.

past 85 years. And it can do so with the exact same tort liability as every other power company in America.

3.2 Rate-Setting and Insurance; No Grave Interference

The TVA's ability to set rates also stymies its "grave interference" argument under *Burr*. Not only *can* the TVA account for potential tort liability in its rates, *it already does so*. On a massive scale.

For example, in 2011, the TVA entered into a consent agreement with the EPA, four states, and several private groups to resolve the TVA's alleged Clean Air Act violations.[79] The settlement required the TVA to invest in upgraded pollution controls, spend at least $350 million on clean-energy projects, pay the EPA $8 million, and pay $2 million in civil penalties to Alabama, Kentucky, and Tennessee. According to the TVA's 2018 10-K Report,

> [t]he TVA Board determined that these costs would be collected in customer rates in the future, and, accordingly, the amounts were deferred as a regulatory asset. Through the end of 2018, $276 million has been paid with respect to environmental projects, $60 million has been paid to Alabama, Kentucky, North Carolina, and Tennessee, and $10 million has been paid with respect to

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[79] *Alabama v. TVA*, No. 3:11-cv-00171 (E.D. Tenn. June 30, 2011) (Doc. 20) (consent decree).

> civil penalties. The remaining deferred amounts will be charged to expense and recovered in rates over future periods as payments are made through 2027.[80]

Further, and unlike other federal entities which cannot use appropriated funds (their only source of money) to purchase liability insurance without express statutory authority,[81] the TVA's being self-funded allows it to buy liability insurance. In fact, the TVA already purchases a variety of insurance policies, including for aviation, auto, marine, and general-liability exposures.[82] The TVA recovers amounts not covered by insurance through its power rates.[83]

The TVA can always raise rates to pay, or insure against, the liability that should follow when it injures people. It is therefore hard to see how immunity from personal-injury suits is "clearly . . . necessary" to "avoid grave interference" with the TVA's work.

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[80] *See* TVA's 2018 10-K Report, at 98 (available at http://www.snl.com/Cache/395786289.pdf) (last accessed January 2, 2019).

[81] *See, e.g., Decision of Gen. Counsel Dembling*, B-158766, 1977 U.S. Comp. Gen. LEXIS 3075 (Feb. 3, 1977).

[82] *See* TVA's 2018 10-K Report, *supra*, at 90.

[83] *Id.*

3.3 "Emergency Response"

Framing this as an "emergency" response,[84] and then invoking that characterization to immunize the TVA's conduct, would bootstrap *any* malfeasance into immunity. The TVA missteps to create a hazard; it then must address that hazard; and, in so doing, it undertakes "discretionary" work that makes it impervious to responsibility. The TVA creates an emergency, in other words, and precisely by doing so shields itself from liability. That is poor logic, bad law, worse policy. When one's own challenged negligence creates an emergency, then it is circular and invariably self-immunizing to invoke that emergency as justification for avoiding suit.

Furthermore, a one-off "emergency response" will often not even interfere with the next day's work — never mind with the TVA's "broad responsibilities."

4. Practical Upshot — Complete Immunity

Finally, it is important to consider some broader and practical aspects of the TVA's position.

First, the TVA asks the Court to move backward against the long-term arc of the law. The TVA puts upside-down the law's tendency to restrict rather than broaden sovereign immunity. In 1940's *Burr*, the Court noted "the current disfavor of the doctrine of governmental immunity," and was persuaded by "the increasing tendency of Congress to

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[84] TVA Br. I, 9, 13–14, 36, 37, 39.

waive the immunity where federal governmental corporations are concerned."[85] One year earlier, the Court had taken a more sweeping historical view of governmental immunity, and offered language that remains instructive:

> [B]ecause the [sovereign-immunity] doctrine gives the government a privileged position, it has been appropriately confined.
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> For more than a hundred years corporations have been used as agencies for doing work of the government. . . . But this *would not confer on such corporations legal immunity even if the conventional to-sue-and-be-sued clause were omitted*. . . .
>
> In spawning these corporations during the past two decades, Congress has uniformly included amenability to law. . . . It is noteworthy that the oldest surviving government corporation — the Smithsonian Institution — has several times been in the law courts, even in the absence of explicit authority and although the general feeling regarding governmental immunity was very different in 1846 from what it has become in our own day.[86]

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[85] *Burr*, 309 U.S. at 245.

[86] *Keifer & Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381, 388–92 (1939) (emphasis added). In noting how courts had "confined" the doctrine of sovereign immunity, *Keifer* pointed to precedent

The Court then reversed an immunity-based dismissal.[87]

Second, there are at least two ways in which the TVA's central arguments invite a demurrer. We may accept all that the TVA says about its broad purposes and mandate, rooted in Acts of Congress. The same may be said of the Postal Service or the FSLIC — entities that, when they were created, were no less important than the TVA to the nation's commerce — and yet this Court tested their suability under *Burr*, without apparent disruption to the separation of powers.[88] We may also agree that it is important to shield from normal tort liability truly "policy"-level, "discretionary," "governmental" work — and then notice that *Burr already accounts for this*. Accept the TVA's most central urgings, and there still is no good reason to accept its fuller analysis or ultimate conclusion.

Last, the TVA's position is practically untenable. If the work challenged here — replacing an electrical conductor; raising a downed power line — if this constitutes "social, economic, [or] political" "policy judgment" for which the TVA cannot be held

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dating back at least 115 years. *See id.* at 388 n.1 (citing *The Pesaro*, 277 F. 473 (S.D.N.Y. 1921) (discussing cases)); *see also, e.g., Bank of United States v. Planters' Bank of Ga.*, 22 U.S. (9 Wheat.) 904, 907–08 (1824) (Marshall, C.J.) ("The State of Georgia, *by giving to the Bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character*, so far as respects the transactions of the Bank, and waives all the privileges of that character.") (emphasis added).

[87] *Keifer*, 306 U.S. at 387–88, 397 (emphasis added).

[88] *Loeffler, supra* (Postal Service); *Meyer, supra* (FSLIC).

accountable — *then what could it ever "be sued" for?* Its sue-and-be-sued clause will have been nullified. (At least, conveniently, on the "be sued" side.) Its notionally "broad" and "liberal" suability will have vanished. The TVA pursues the end that as an entity it naturally prefers. (Everyone, corporate or individual, governmental or private, hopes to avoid tort liability.) But the TVA's reasoning is out of step with constitutional, statutory, and case law. And its position will ultimately harm the wider community that the TVA was created to serve.

CONCLUSION

The Eleventh Circuit's decision should be reversed.

Respectfully submitted,

Franklin T. Rouse
Counsel of Record
Conchin Cloud & Cole, LLC
2404 Commerce Court, S.W.
Huntsville, Alabama 5801
(256) 705-7777
taylor@conchincloudcole.com
Counsel for Petitioners

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